THE JOURNAL OF LIBERTARIAN STUDIES

AN INTERDISCIPLINARY REVIEW

VOLUME VI, NUMBERS 3–4 SUMMER/FALL 1982

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AN INTERDISCIPLINARY REVIEW

Murray N. Rothbard, Editor

VOLUME VI, 1982

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The Journal of Libertarian Studies, Vol. VI, Nos. 3–4 (Summer/Fall 1982)

American Isolationism, 1939–1941

by Justus D. Doenecke

Department of History, New College
University of South Florida

The isolationist tradition in America, as it was manifested from 1939 to 1941, was based on two fundamental doctrines: avoidance of war in Europe and unimpaired freedom of action. Isolationism differs from pacifism (a refusal to sanction any given war), and one could call for strong national defense, seek overseas territories, and demand economic spheres of influence and still be an isolationist. To be sure, isolationists and pacifists often joined forces, and the onslaught of the European war saw a renewal of this tenuous alliance. It was, however, always a marriage of convenience.

Isolationist and pacifist opponents of American entry agreed on one basic premise: participation in war would weaken the United States and indeed place her survival as a free republic in jeopardy. Conservatives saw the capitalist economic system in peril, as full-scale mobilization was bound to bring in its wake inflation, price and wage controls, compulsory unionization, and — in practicality — a wartime socialism that would remain after the conflict ended. Colonel Charles A. Lindbergh was even more apprehensive: "God knows what will happen here before we finish it [World War II] — race riots, revolution, destruction."[1]

Liberal isolationists had different fears, ones that were in some ways the reverse of the conservatives'. To liberals, war would not only terminate the New Deal. It would turn the clock back to the days of Coolidge, when big business appeared triumphant. The nation would be engulfed in "armament economics," a sure sign of forthcoming fascism. Soon low wages and farm prices would commence; then strikes would be outlawed. On "M-Day," or "Mobilization Day," a centralized defense force would assume dictatorial powers, including supervising the conscription of at least a million men. After the immediate and artificial war boom ended, the grim days of 1929 would again be at hand. Civil liberties would be terminated, national censorship imposed, and the clampdown would be so severe that the antics of the Creel Committee and the intimidation of the espionage laws of 1917 and 1918 would seem mild by comparison.

Particularly haunting was the memory of World War I. An entire generation had been raised on the revisionist histories of Sidney Bradshaw Fay, Harry Elmer Barnes, and Walter Millis. And, even if one was not an intellectual, the message conveyed by Ernest Hemingway and Lawrence Stallings was quite simple: war

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was neither purposeful nor glorious. It was, as one character noted in John Dos Passos's *1919* (1932), "a goddamn madhouse."[2] Senator William E. Borah cited harrowing battle descriptions ("Chunks of human flesh were quivering on the branches of the trees"). Congressman Daniel Reed told, in frightening fashion, of the gassed troops he saw in a British hospital during the World War.[3]

And if the horrors of the Great War were not enough, there was the unjust Versailles treaty. More than one isolationist drew a direct connection between the Paris Peace Conference — that "orgy in ink," as Senator Henrik Shipstead called it — and the rise of Hitler.[4] Because the allies strangled the Weimar Republic, building what Senator D. Worth Clark called "a ring of steel" around Germany, Hitler was inevitable.[5] The failure of the allies to pay their war debts was simply another example of their duplicity, though one that symbolized European ingratitude. More to the point was the appeasement at Munich, where Britain and France willingly destroyed Europe's only viable democracy. The dispute over Danzig had all the earmarks of a farce. Britain, so Senator William J. Bulow claimed, should have permitted the people of that city ("who were Germans and formerly belonged to the German Reich") to reunite with their mother country.[6] A week before war broke out, Lindbergh confided to his diary, "Poland is beyond help under any circumstances. The German Army alone will close the Corridor within a few days after it attacks, and there is no other way for England and France to get to Poland."[7]

To many isolationists, Europe was always at war and would always be so. Senator Sheridan Downey began his discussion of cash-and-carry with the Battle of Hastings ("Mr. President, let us begin with 1066"), Congresswoman Frances P. Bolton charted a hundred years of European wars, and Representative Louis Ludlow remarked, "The Almighty created man with the traits of a fighting animal and there will always be wars."[8] The 1939 war was, to use the language of Lindbergh, simply one "more of those age-old quarrels within our own family of nations."[9] The fact was, so isolationists maintained, that the allies had no positive war aims. They only sought the defeat and partition of Germany, a Carthaginian peace bound to create more dictators and more wars of revenge. Even the Atlantic Charter, signed by Roosevelt and Churchill in July 1941, and the Four Freedoms, proclaimed by Roosevelt just a year before, were unsatisfactory. Furthermore, so Senator Hiram Johnson argued, "The four liberties for which the President so eloquently appealed . . . would have but a sorry chance of existence if we would rank our enemies from Greenland's icy mountains to India's coral strand."[10]

All such manifestoes could only be propaganda, and isolationists warned against Propaganda — with a capital P — as a physician warns against disease. Alert citizens, they claimed, must be able to detect it instantly and thereby be able to quarantine themselves against it. In his article in *Collier's*, printed in March 1941, Lindbergh stressed how the British were deliberately misleading Americans on a number of matters: Germany's air capabilities, France's chances of victory, the desperate condition of Finland, allied successes in Norway, and the potential of German submarines.[11] Actress Lillian Gish warned against uncritical accep-

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tance of atrocity stories. "I remember," she told an audience in Chicago, "when we got back to America late in October 1917, the people asked us in all seriousness if it were true that the Germans cut off the hands and legs of old people and crucified little children."[12]

The isolationist world differed markedly from that of the Roosevelt administration. Aside from blaming Nazism first on Versailles, then on allied appeasement, the isolationists held no brief for Germany. "No one," said Senator Hiram Johnson, "could wish more ardently than I do for the defeat of Hitler."[13] Senator Burton K. Wheeler expressed "horror" over Nazi treatment of Germany's Jews.[14] Senator Robert A. Taft found himself detesting every action of the German government since Hitler assumed power.[15] To former president Herbert Hoover, the sufferings of occupied Europe "cry out to the sympathy of every decent man and woman."[16] Even Charles A. Lindbergh, who studiously avoided any public condemnation of Germany, claimed to be "very much opposed to what happened in the German invasion of Poland."[17]

Yet, with Soviet Russia lurking in the background, isolationists saw an anti-Hitler crusade as futile. Stalin's dictatorship, so some argued, was even harsher than Hitler's and the apparently ecumenical appeal of communism made it, in a long run, a far greater threat. Francis Neilson, essayist and World War I revisionist, confided to his diary that only Hitler could stop "Red Revolution from the Rhine to the Urals."[18] Once the belligerents are bled white, predicted Representative Hamilton Fish, "the Communist vulture will sweep down on the bloody remains of Europe."[19] Within a week after Hitler invaded Poland, Senator Taft said, "Apparently Russia proposes to sit on the side-lines and spread Communism through the nations of Europe, both the defeated and the victorious."[20] Major Al Williams, air columnist for the Scripps-Howard chain, found the Soviet Union "the bloodiest sponsor of mass murder in the pages of history."[21] When Hitler invaded Russia, forcing her entry into the war, Hoover declared that intervention now would be a "gargantuan jest."[22] One should not choose between evils; one should simply stay out of the fracas.

Most isolationists were sympathetic to England and hoped that Great Britain would hold off the Nazi onslaught. Hence, the great majority expressed support, even at times going so far as to boast of British ancestry. As Congressman Harold Knutson put the issue, "There are times when I become so indignant over the way . . . she violates the rights of neutral nations and her disregard for international law, that I could grab the old squirrel rifle off the wall and go on a little war of my own. However, when I think of the stabilizing influence of that mighty empire I realize that its continued existence is necessary to the preservation of democracy and representative government."[23] True, some isolationists — such as Lindbergh and Colonel Robert R. McCormick, publisher of the *Chicago Tribune* — opposed any aid to Britain, arguing that such aid only encouraged her to seek an impossible victory. Far more isolationists endorsed such aid, provided that the British transported the goods themselves, paid cash for them, and did not buy munitions needed for American defense.

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Yet if good business and moral encouragement were one thing, going to war on Britain's behalf was something quite different. In an effort to curb the nation's increasing sympathy for the British cause, isolationists stressed the negative qualities of that nation.

The attack took several forms. One involved criticism of her leaders. Neville Chamberlain and Lord Halifax were portrayed as the architects of Munich, British ambassador Lord Lothian as a confident of Hitler. Winston Churchill perhaps received the greatest abuse of all, for the prime minister was quoted as having told William Griffin, editor of the *New York Enquirer,* in 1935 that England had defended the United States in World War I and should therefore be forgiven her war debt. Furthermore, Churchill supposedly had said that United States entry into the war prevented peace early in 1917, a peace which would have prevented the Bolshevik revolution, Italian fascism, and the rise of Hitlerism. In any future war, so Churchill supposedly predicted, "the United States will be dragged in." (Churchill denied all these statements).[24]

Another attack centered on Britain's government and policies. Isolationists brought up the Dusseldorf agreement, an arrangement by which the Federation of British Industrialists sought to collaborate with powerful German counterparts to capture varied markets, including those of the United States.[25] Other isolationists stressed that Britain was no longer a democracy (if it had ever been one). It was a wartime dictatorship with centralized powers equalling those of Hitler.

Probably the greatest focus of isolationist attack was the British Empire, and hardly an area dominated by the Union Jack escaped their scrutiny. Although Palestine and Africa were occasionally brought up, India and Ireland were the areas most frequently mentioned. Senator D. Worth Clark cited Edmund Burke's indictment of Warren Hastings, governor general of India at the time of the American Revolution, then went on to claim that the British record in Ireland was ten times as savage as Germany's persecution of minorities.[26]

As far as the rest of Europe was concerned, isolationists commented sporadically. They often treated France with contempt, portraying her as an inept and decrepit empire. They debated aid to Finland. To some, the cause of the Finns was a noble one. The only nation that had repaid its World War debt to America was facing the bloodiest tyrant of Europe. Congressman Fish, endorsing a twenty million dollar loan to Finland, declared, "If we do not make it, the Communists, 'reds,' fellow travelers, and all subversive elements will rejoice; but the decent, loyal, democratic, peace-loving American people will hang their heads in shame."[27] To other isolationists, however, Finland could be the foot in the door, the ploy by which the warlike Roosevelt administration could entice the United States into the European conflict. Congressman John Rankin remarked, "I am in sympathy with bleeding Finland. . . . I was in sympathy with bleeding Poland, and with bleeding Manchukuo, and I am in sympathy with bleeding China. . . . But we cannot begin to send America's money, which ultimately means sending American men into every nook and corner of the world that is threatened with war or revolution."[28]

Finland was not the only nation subject to eulogy. Until May 1940, such

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neutral powers as Belgium and the Netherlands received isolationist praise for successfully avoiding the conflict, indeed for being possible mediators. Isolationists were less appreciative of Greece and Yugoslavia, finding neither nation a genuine democracy. When they fell to Germany, they blamed presidential emissary William J. Donovan for giving Yugoslavia in particular false hopes.

Turning to the Pacific, isolationists responded to Japan in a variety of ways. They often attacked the shipping of American war supplies, claiming that Roosevelt had hypocritically refused to invoke the neutrality acts when profits were at stake. "We have," commented Congressman August H. Andresen in February 1941, "supplied Japan with enough scrap iron during the past 4 years to build 50 warships."[29] At the same time, they feared a direct confrontation. For the United States to commit herself to the Dutch East Indies and Singapore, so isolationists maintained, would be a backdoor to war, and European involvements could come automatically into play with Japanese attack. As Congressman Dewey Short commented, "Why enter a war in Europe exposing our west coast to a rear attack from Japan who would certainly fight us . . . ?"[30]

In their efforts to offer alternatives to administration policy, isolationists stressed military and economic self-sufficiency. Roosevelt and his supporters, so anti-interventionists claimed, were deliberately creating hysteria in order to ripen Americans for war. They opposed a mass army, finding it of necessity too bulky and ill trained to be of help in any conflict. Indeed, unless one envisioned a new Allied Expeditionary Force to fight in France, such a unit could only be superfluous. Isolationists debated the wisdom of a large navy, with some finding large battleships ineffectual.

Far more consensus was developed over air supremacy, and several isolationists — such as Senator Ernest Lundeen — called for a separate air department. Not all isolationists would go as far as Major Williams, who wrote that "the nation that rules by air will rule the world."[31] Most, however, would agree with two writers for the liberal non-interventionist monthly *Common Sense*. America, said Cushman Reynolds and Fleming MacLiesh, needed "an air power great enough to make the skies untenable for any person who dared to come against us."[32]

Isolationists maintained that the hemisphere, properly defended, was impregnable. Hitler, said economist John T. Flynn, would "have to bring at least a million men here, and he would have to send along over a hundred thousand trucks, trailers, tanks, motorcycles, and autos of all sorts, and guns, common munitions, and food piled mountains high."[33] Isolationists also quoted Lieutenant Colonel Thomas R. Phillips, who wrote, "Imagine a convoy of 50 troopships crossing 3,000 miles of the Atlantic. The departure of such a force could not be kept secret. Our defending bombers would start attacking at a thousand miles from the coast. . . . The picture is incredible. What leader would risk thousands of men, packed in transports like sardines, under such bombing conditions?"[34] The totalitarian powers could no more transport several million men to the Western Hemisphere than could the United States land such numbers on the European continent.

At the same time, isolationists called for hemispheric domination. Senator

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Robert Rice Reynolds led one crusade, that of permitting the British to cancel their war debts in return for United States ownership of their Caribbean possessions. Similar sentiments were voiced concerning such French territories as Martinique, Guadeloupe, and French Guinea. "Quit stalling — just take them," said the *New York Daily News*.[35] Former State Department official William R. Castle maintained that the United States might have to use force to "quell disturbances" in Central America and the Caribbean.[36] General Robert E. Wood claimed that "no government in Mexico, Central America and the Caribbean South American countries will be tolerated unless it is friendly to the United States," and that, "if necessary, we are prepared to use force to attain that object."[37]

The United States, according to the isolationists, did not lack strategic raw materials. "More than adequate," claimed Hanson Baldwin, military editor of the *New York Times*.[38] MacLiesh and Reynolds concurred, saying that the nation possessed abundant aluminum, coal, tin, rubber, nickel, manganese, oil, and cotton.[39]

Several isolationists, in Congress and out, denied that Germany posed any economic threat. To Senator Gerald P. Nye, German victory might even improve America's trade prospects, as Great Britain, "our chief competitor," would finally be removed.[40] Senator Taft simply said, without elaboration, that he saw no reason why United States trade would be destroyed "so long as we are at peace."[41] Senator Wheeler was equally terse, declaring at Dubuque on June 21, 1941, "We can do more than compete . . . . We can undersell the Nazis."[42] "After all," said General Wood, "when two nations or two continents each have things the other needs, trade eventually results regardless of the feelings each may have for the other." In "mutual commercial understandings" between the Americas and Germany, the relatively self-sufficient United States would have the natural advantage.[43]

Yet, though the United States could survive military and economic threats, it could never invade Europe. In World War I, noted Flynn, Germany stood off "two or three million Frenchmen, a million Englishmen, a vast army on her eastern flank by Russia, and Italy on the side of the Allies." Now England was standing alone, and American forces could not make up the difference.[44] To cross the ocean and land on a fortified continent, said Lindbergh, was a "superhuman task," one that would probably lead to the loss of millions of American lives.[45]

Given Hitler's continued domination of the European continent, America — isolationists argued — must seek a negotiated peace. Some isolationists suggested terms, such as Wheeler, who spoke of restoration of Germany's 1914 boundaries; the return of former German colonies; an autonomous Poland and Czechoslovakia; the restoration of an independent France, Holland, Norway, Belgium, and Denmark; the return of Alsace-Lorraine to France; protection of religious and racial minorities in all countries; internationalization of the Suez Canal; no indemnities or reparations; and arms limitation.[46]

One of the more publicized efforts came from Congressman John Vorys. In

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May 1941, Vorys began seeking what he called "an American peace offensive." The United States, he said, should state its peace aims, call for an immediate armistice, and offer to mediate the conflict. Such an effort would not be dictated by a single power; indeed, it would lead to a free European commonwealth. If Hitler refused equitable terms, he would lose his following among the German people. True, the German leader might not be trustworthy, but the terms could be enforced in several ways: impounding arms on both sides, joint or international control of strategic positions, and economic retaliation. In addition, the promise of food, money, and material could be used to keep the peace.[47]

Most of the time, however, isolationists did not deal with wide-ranging speculation but attacked specific administration proposals. The first of these was cash-and-carry. On November 4, 1939, Roosevelt signed a bill repealing the arms embargo and permitting foreign nations to buy munitions for cash, provided that they carried the goods themselves. Isolationists offered a variety of objections. Altering neutrality law in wartime was illegal, or as Fish called it, "changing the rules after the kick-off in a football game."[48] In addition, the United States was betraying its partisanship, or as Congressman George A. Dondero commented, "If two men are fighting in the street and you are standing nearby and give one of them a knife, are you neutral?"[49] Isolationists advanced other arguments: such legislation violated international law; American vessels could still be sunk; the arms traffic, with the inevitable accompanying loans, would lead to American participation just as surely as it did in 1917.

When, in the summer of 1940, Congress passed conscription, many isolationists balked. The army and navy, they maintained, should first try voluntary enlistment. To fulfill even more broadened responsibilities, the regular army needed no more than 400,000 men. The German campaign in France did not prove conscript armies to be impressive. Rather, it showed the importance of relatively small cadres of elite troops trained in tank warfare. True, the army needed hundreds of thousands of skilled mechanics, pilots, and technicians. Conscription, however, merely would give millions a year's training in military drills, manual of arms exercises, and bayonet practice. As Senator Edwin Johnson commented, "Minutemen went out of style with the flintlock musket."[50] Little wonder some of the nations at war — Canada, Australia, and New Zealand — had not adopted conscription for military service outside their own countries.

Lend lease undoubtedly caused the greatest debate of all, for after its passage the United States was overtly committed to allied victory. Signed by Roosevelt on March 11, 1941, the law permitted the president to lease, lend, or otherwise dispose of property of the United States to nations defending themselves against aggression. It encompassed broad powers indeed, and ones that the isolationists little liked. Some isolationists found the powers both too sweeping and too warlike. As Senator Burton K. Wheeler noted, " 'Defense articles' under this bill embrace all articles from battleships to bath powders, from bombers to the billions of gold buried in old Kentucky, from cannon to Willkie buttons . . . . on the sinister side they include crutches and artificial limbs and books in Braille type

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and identification tags and coffins and crosses for the countless future victims of our folly."[51] Other anti-interventionists stressed that besieged Britain still possessed numerous resources. Furthermore, so claimed such isolationists as Fish, no such bill could be effective without convoys, and Roosevelt himself was frequently quoted to the effect that convoys would lead to war. Spending too was a factor, with such individuals as Congressman Frederick C. Smith claiming that lend lease would ruin the American economy.

Another major debate came with draft renewal, approved by Roosevelt on August 18 after having passed the House six days before by one vote. True, the leading isolationist body, the America First Committee did not — as an organization — oppose it, for its leadership feared accusations of disloyalty and found the issue too tangential from the wider intervention problem.[52] Some isolationists claimed that the world situation had improved over the past year. With Russia now in the conflict, Britain had a far greater chance of survival. Isolationists again saw an AEF in the offing. Congressman Reed was particularly caustic, declaring, "If this is an army for an expedition abroad, then we should be beginning now to lay out our hospital program."[53] Anti-interventionists noted that army morale was already bad enough, without breaking faith with young men who assumed that their term of service would only be one year. In any case, the isolationists argued, such massive troops were not needed.

The last major debate concerned repealing the primary features of the neutrality act of 1939. On November 17, 1941, Roosevelt signed a bill permitting American merchant ships to carry goods of any kind, including implements of war, to belligerent ports. Furthermore, it removed the prohibitions on arming American merchant ships. Again, isolationists saw an administration effort to maneuver the nation into full-scale combat, although several isolationists claimed that the United States had already long been acting as a belligerent. Armed convoys, some argued, were quite unsafe, being unable to respond to submarine attack. As Congressman Paul W. Shafer remarked, "To send our merchant seamen out into the ocean in armed vessels would be comparable to sending a 10-year-old boy out into the jungle to hunt ferocious tigers with a slingshot."[54] Representative Dewey Short presented the issue differently: "When you put guns on a merchantman and send it into dangerous war zones, you might as well put boxing gloves on Eddie Cantor and put him in the ring with Joe Louis."[55] Furthermore, claimed the isolationists, as British shipping was recovering, the administration proposal was not only dangerous; it was unnecessary.

Throughout all these individual debates, isolationists accused the administration of deliberately fostering hysteria. In October 1939, Senator Rush Dew Holt noted that the supposed submarine menace was merely "snapping turtles striking their heads out of the water looking for air."[56] "It won't be long now," said Wheeler a year later, "before we will be spying on each other and seeing German U-boats in the Great Lakes and enemy airplanes over the Rocky Mountains."[57] During the debate over lend lease, Fish warned that the administration soon "will be asking for submarines in the Dust Bowls."[58] Even the more sober Robert

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Maynard Hutchins, president of the University of Chicago, accused Roosevelt of "conducting a war of nerves . . . against his own people."[59]

The isolationists possessed various assets upon which they could draw. One was ideological. They could point to a host of statements, ranging from George Washington's Farewell Address to Roosevelt's Chautaqua speech of 1936, each warning against foreign involvements. They could draw upon majoritarian sentiment, for advocates of full-scale intervention were always in a clear minority. Their course, isolationists claimed, was the only way one could implement the will of the 83% of the populace which, even at the height of prowar sentiment, opposed direct American entry in the conflict.

Within the population, certain elements were particularly militant. If congressmen at all reflect their constituency, one can point to a substantial cadre of anti-interventionist sentiment, based in particular in the Old Northwest and Great Plains states, but extending as well to the Border states, Pacific coast, rural Northeast, and even parts of some northern cities. Then, despite defections by presidential candidate Wendell Willkie and various prominent eastern Republicans, the preponderance of Republican party sentiment remained isolationist.

Some occupational groups were centers of antiwar sentiment, and until well into 1940, one could find anti-administration sentiment disproportionally centered in students, farmers, and industrialists. Even when the Congress of Industrial Organizations veered towards Roosevelt's foreign policy, its founder and most prominent member, John L. Lewis, staunchly opposed intervention. Protestant and Roman Catholic clergymen differed among themselves on the issue, but the bulk of church periodicals and religious assemblies remained suspicious of intervention. Certain ethnic groups housed strong isolationist sentiments — in particular Germans, Irish, Italians, and blacks.

In addition, isolationists had significant vehicles with which to rally sentiment. Several giant newspaper chains remained isolationist until Pearl Harbor, including the Hearst and McCormick-Patterson syndicates. True, the Scripps-Howard chain defected during the lend lease debate, but — as later with the *Saturday Evening Post* — the conversion always appeared halfhearted. To the very eve of American entry, *Reader's Digest* welcomed isolationist articles as much as it did interventionist ones, and some of the most strident isolationist essays — such as Freda Utley's "Must the World Destroy Itself?" — appeared there. If the network commentators and newscasters tended to be interventionist, isolationists presented their message through various radio forums and through an occasional commentator, such as Boake Carter or the far more urbane Quincy Howe. As far as individual leaders went, Lindbergh could match the charisma and magnetism of Roosevelt. Such isolationist legislators as Wheeler, Nye, and Vandenberg could never gain a congressional majority for their position, but — particularly in the case of Wheeler — they could offer articulate and impassioned arguments for their position. There was no lack of isolationist visibility.

A wider point can be made concerning Congress. If, in the House and Senate, isolationists lost every significant battle, they could find compensation in two

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factors. First, they could take comfort in close votes, as witnessed in the house by the one-vote margin on draft renewal and by the ten-vote margin on repeal of the neutrality act. In the latter vote, congressmen casting isolationist votes represented about fifty percent of the voters, and inroads were made in the normally pro-administration South. Second, organized isolationist opposition undoubtedly forced the president to slow down the pace of interventionist activity, particularly on such matters as convoys and the sending of draftees outside the hemisphere.[60]

As far as support among intellectuals went, the isolationists were soon in a minority, though it was not a hopeless one. They possessed in their ranks two internationally respected jurists (John Bassett Moore and Edwin M. Borchard), the dean of American historians (Charles A. Beard), the most publicized of the university presidents (Robert M. Hutchins), the nation's leading architect (Frank Lloyd Wright) — and other prominent intellects as well. If *Newsweek*, the *New Republic* and *Look* had defected from isolationist ranks by the end of 1940, *Common Sense* still remained. The Socialist Party adopted an isolationist platform (though one that caused the defection of many members), and its leader Norman Thomas was one of the most respected proponents of anti-interventionism.

For at least a year after the Danzig incident, the isolationists lacked the organizational bases interventionists possessed in a variety of organizations: the Non-partisan Committee for Peace through the Revision of the Neutrality Law, the Committee to Defend America by Aiding the Allies, and the Fight for Freedom Committee. They had to rely upon various pacifist groups, with Frederick J. Libby's National Council for the Prevention of War having the widest appeal. There were, of course, a number of other anti-interventionist bodies, such as the pacifist Women's International League for Peace and Freedom, the Communist-backed American Peace Mobilization, and the pacifist-socialist Keep America Out of War Congress. In December 1940, Iowa editor Verne Marshall sought to organize the No Foreign War Committee, but the founder's volatile personality caused the group to fold up within four months. A year before, a group of college students had organized the American Independence League to blanket the campuses, but it took no stand on cash-and-carry and disbanded within the year. It was only when the America First Committee was launched in the fall of 1940 that the isolationists possessed an organization that could secure a mass base, and by the time of Pearl Harbor, the AFC had 450 units and up to 850,000 members.

Such strengths could by no means compensate for the handicaps under which the isolationists were operating. From the beginning, the isolationists were put on the defensive. Even the label "isolationist" — which, for better or worse, has remained with us — was a perjorative one, one that connoted blindness, imperviousness, and indeed moral callousness to a crumbling world. Initially, almost every party to the debates pledged to do nothing that would entice the nation in war. Yet, by late 1940, there were notable conversions to interventionism, particularly in the press, business, and labor circles.

If today some historians find Roosevelt weak and vacillating, the president

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was still a most skillful maneuverer. As Wayne S. Cole notes, "He could be relied upon to choose no grounds which would give the non-interventionists a serious chance to defeat him."[61] To the frustration of the isolationists, Roosevelt never presented the issue as one of "peace or war." At first he claimed that the measures he proposed were the best means of avoiding conflict. By the middle of 1941, the president was asserting that circumstances thrust upon the United States were forcing it to take such defensive measures as the "shoot on sight" order issued on September 6, 1941.

In addition to actions taken by Roosevelt with congressional majority support, he took certain initiatives on his own. Included were the destroyer-bases deal, sending American troops to Iceland, placing Greenland under temporary United States guardianship, proclaiming an unlimited national emergency, freezing Japanese assets, and pledging American armed support if Japan attacked Dutch or British colonies in the Pacific. Isolationists were able to challenge him, but to no real avail, on several occasions. They called his bluff on such things as administration duplicity in the *Greer* incident, the "secret" German map to reorganize Latin America into five vassal states, and the supposed plan to replace all religions with an International Nazi Church.[62]

Isolationists railed against selected administration figures. When, for example, American Minister of Canada James H. R. Cromwell called upon his nation to join the allies, Representative Martin Sweeney told him to "get the hell out of this Republic."[63] Anti-interventionists were particularly hard on Secretary of the Navy Frank Knox and Secretary of War Henry L. Stimson, two Roosevelt appointees who were always pressing him to greater militancy. Both men, claimed Wheeler, had always opposed domestic reform and their entry into the administration did not make them any the less reactionary: "The minute the Democrats take a man from Wall Street he becomes a liberal, and the minute he does not come along with us he is a reactionary. A leopard does not change his spots that quickly."[64]

Such invective mattered little, however, for the administration — usually secure in its congressional majorities — dominated the terms of the debate. Much of the Republican party consistently opposed Roosevelt's proposals, even attacking its own interventionist standard-bearer Wendell Willkie. However, as late as 1941, party wheelhorses still found Willkie the most popular Republican in their ranks, and there was always enough dissention in party ranks, particularly in the East, to prevent a united front.[65]

Polls consistently showed that Americans would *risk* war to aid the British and defeat Germany, and for the administration this was the important thing. Isolationists might deplore such canvassing as the Gallup poll, with Senator Lundeen claiming, "This man may have the name of 'Gallup,' but I have never heard him galloping around getting anybody's opinion about anything."[66] Many sought an advisory war referendum, but as the crusade received little general support, polls remained the fundamental indicator of public opinion.

Despite the efforts to mobilize mass sentiment, most agencies of what is now

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called the media opposed the isolationists. The *New York Times,* the *New York Herald Tribune,* and the Luce and Cowles publishing empires were all interventionist, as were such mainstays of American liberalism as the *Nation* and *New Republic* (the latter by the summer of 1940) — both journals possessing such strength as the isolationist counterparts, *Common Sense* and the *Progressive,* could never hope to match. Almost any movie dealing with international themes, even if the setting was ostensibly the Napoleonic wars, took an interventionist position. Though many newscasters and correspondents were not interventionist, the reports of German blitzkriegs were by themselves bound to alarm Americans. Administration efforts to create "national unity" under the aegis of "defense" could therefore capitalize on fears already prevalent among many citizens.

In comparison to the America First Committee, William Allen White's Committee to Defend America by Aiding the Allies was always better organized and possessed far more chapters. Its offshoot, Fight for Freedom, similarly benefited from professional leadership drawn particularly from the fields of finance and communications. And while America First had some prominent sponsors, the interventionists had many more. Anne Morrow Lindbergh saw the interventionists as "the East, the secure, the rich, the sensitive, the academic, the good"; on her side were those "not smart, not rich, not intellectual, dowdy, hard-working good people, housewives, shopkeepers, etc."[67]

Of course, the debate was vitriolic on both sides, but the isolationists in particular faced harassment. Several isolationist columnists were dropped from newspapers and magazines, including such liberals as Harry Elmer Barnes, John T. Flynn, and Oswald Garrison Villard. Isolationists, from Yale assistant football coach Gerald Rudolph Ford to actress Lillian Gish, felt economic pressure,[68] and civil liberties were occasionally violated, including the denial of speaking engagements in such places as Miami, Atlanta, Oklahoma City, Pittsburgh, Philadelphia, and Portland, Oregon.

Some intimidation went further, for — as Richard W. Steele notes — Roosevelt sought "to silence or discredit the critics of his administration's foreign policy." Steele has found incident after incident: use of the Federal Bureau of Investigation to wiretap isolationist labor leader John L. Lewis; Roosevelt's public accusation, made on November 1, 1940, that Republican leaders were in an "unholy alliance" with both communism and Nazism; the forwarding — in the spring of 1940 — of names of opponents of the president's defense policy to the Justice Department; an order for an FBI investigation of America First; Roosevelt aide John Franklin Carter's investigation of Senator Wheeler. In addition, Steele writes, Roosevelt "ridiculed those reporters with the temerity to challenge his policy." Furthermore, Roosevelt claimed that "if it [radio] proves to be a bad child, there would be a disposition to teach it some manners, correct it, and make it behave itself." Steele concludes, "What the president battled . . . was not disloyalty but the doubt of a minority of Americans concerning the origins and purposes of the war. Instead of tackling these misgivings head on, admittedly a difficult task of education, FDR chose to discredit and dismiss them."[69] Obvious-

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ly, as Wayne S. Cole has observed, a calculated effort was made to link isolationism to Nazism.[70]

With the administration acting the way it did, it is little wonder that much of what we now call the media was most unfair, using words such as "appeaser," "pro-Nazi," and "anti-Semitic" with abandon. One historian notes that administration defenders ignored the sincere motives of the isolationists; instead, they treated isolationists as "a deliberate conspiracy aimed at circumscribing the President's freedom of action."[71] The accusation, immediately proven false, that Senator Lundeen was being followed by federal agents at the time of his death was just one example of this approach. It is true that Lindbergh exposed himself to charges of anti-Semitism by singling out Jews as a group and indeed warned that Jews possessed "large ownership and influence in our motion pictures, our press, our radio, and our Government." Wayne S. Cole notes that the general tone of Lindbergh's remarks, made in Des Moines in September 1941, was one of sympathy and understanding towards Jews. Yet to raise any such issue at all was to court intensive attack, one that — in Cole's words — "dealt America First and the noninterventionist movement a staggering blow."[72]

To evaluate the wisdom of the isolationist perspective is essentially an ahistorical task. There are too many intangibles. Bruce Russett argues that by the end of 1941, lend lease and convoys assured British survival. Germany, continues Russett, was hopelessly bogged down in Russia and therefore had no chance of dominating the European continent. Hitler might rave of ultimately fighting the United States, but he lacked the capacity to wage such a war successfully.[73] Yet Russett's thesis can be challenged. It was, for example, debatable whether, late in 1941, Britain and Russia could have survived without American help. And had either or both countries been defeated, how much would the global strategic balance have been altered? Had Hitler been able to create an intercontinental empire, could the Western Hemisphere have been able to resist?

A far more fruitful task is to evaluate isolationist tactics in light of their goals. From one standpoint, isolationists did surprisingly well, for they undoubtedly slowed down Roosevelt's drive for intervention. The nation could well have been in full-scale war much sooner had not the isolationists mobilized as they did.

From another standpoint, however, they faced far too many handicaps. As pointed out earlier in this article, isolationists were on the defensive from the outbreak of the European war, and their own position possessed ambiguities that could only weaken them. Isolationists never clarified what was essential and unessential in national defense and hence wavered on draft renewal. The call for a negotiated peace appeared at best utopian, particularly as Germany wanted a peace that would permit it to dominate Europe. Although one can find frequent, offhand comments concerning Japan, most isolationists neither realized the precariousness of American negotiations nor thought through what the nation's Pacific policy should be.

In terms of effectiveness, Lindbergh was a mixed blessing. On the one hand, he was the only isolationist leader who could match the charisma of FDR, and he

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bore an image of integrity that Roosevelt often could not duplicate. But on the other hand, Norman Thomas made telling points when he asked the prominent aviator to emphasize his opposition to fascist tyranny, demand the continuance of Britain and her self-governing dominions as absolutely independent nations, and clarify his position on American "cooperation" with any victor, be that victor Germany or Britain.[74] Lindbergh's refusal to return the Order of the German Eagle, when he could have returned all his foreign decorations once war broke out, needlessly exposed him to villification. In a sense, the Des Moines speech was simply the culmination of these events.

The isolationists' story, however, still has contemporary significance. Their warnings against presidential duplicity remain timely, as does their critique of messianic policy pronouncements. They continued their fight while knowing the degree to which both the administration and the establishment media were against them, thereby showing that one did not have to knuckle under to "irreversible tides." Years after Pearl Harbor, few isolationists regretted the battle, no matter how much their reputations were ruined. For them, the crusade was always one of highest patriotism — and wisdom as well.

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Ambivalence, Ambiguity, and Contradiction: Garrisonian Abolitionists and Nonviolence*

by Richard O. Curry
and Lawrence B. Goodheart

Department of History
University of Connecticut

Historian Alice Felt Tyler once used the expression "Freedom's Ferment" to characterize the antebellum period in American history.[1] It was an apt phrase referring to the multitude of reform movements, religious enthusiasms, and social experiments which transformed American culture in fundamentally important ways. The modern abolitionist movement emerged out of this cauldron of ferment — a movement which called for immediate repentance from the sin of slavery, and denounced the South's peculiar institution in thunderous, vituperative terms. The abolitionists' rhetoric called down upon their heads mobs in the North and threats of reprisal in the South and ultimately of secession if slavery was not granted absolute security by the North. But northern abolitionists were not only courageous but unrelenting in condemning slavery as sin and calling for the elevation of black people to an intellectual, moral, and political equality with whites.

In essence the sin of slavery was not simply the brutalization and exploitation of one human being by another. It also stemmed from the fact that enslavement prevented black people from being "free moral agents." As the constitution of the Lane Seminary Antislavery Society phrased it, God created the black man as "a moral agent, the keeper of his own happiness, the executive of his own powers, the accountable arbiter of his own choice." Slavery "stifle[d] the moral affections, repress[ed] the innate longings of the spirit, paralyze[d] conscience, turn[ed] hope to despair and kill[ed] the soul."[2] But if most early immediate abolitionists advocated the use of moral suasion to bring about the repentance of slaveholders, they nevertheless warned that if slaveholders did not take heed by

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voluntarily emancipating their slaves, an angry God would visit his wrath on a sinful nation — the end result of which would be violence, bloodshed, and civil war. As the constitution of Lane's Antislavery Society warned, slavery "aroused feelings of desperation and revenge, provoke[d] insurrection and periled public safety." It "fomented division and alienation in our public councils and put in jeopardy the existence of the union," and it paralyzed "all missionary effort" and "expose[d] the nation to the awful judgment of God."[3]

In sum, there was a degree of ambiguity or ambivalence in the commitment of many abolitionists to nonviolence from the outset.[4] Even so, it is clear that the principles of nonviolence were still the dominant abolitionist credo in the 1830's and early 1840's. But between the Mexican War of 1846–1848 and the secession of the South in the winter of 1860–1861, pacifism declined in importance, and the call for a holy war against the evil of slavery increased in some abolitionist circles. One of our major tasks here, therefore, is to explain in comprehensive terms why nonviolent principles gradually lost ground to the idea of waging a jihad against sin.

Before attempting that, however, we should first examine the nature of the abolitionist commitment to moral suasion and pacifism, particularly that of the Garrisonian or "ultra" wing of the abolitionist movement. The Garrisonians, unlike other abolitionists after 1837, not only attacked the institution of slavery but challenged the legitimacy of all human institutions, including civil government. In order to understand what is known as Garrisonian nonresistance, we must analyze the implications of the work of historian Lewis Perry. His book *Radical Abolitionism* and his recent biography of the Garrisonian abolitionist Henry Clarke Wright provide the most detailed, perceptive, and complex analyses of Garrisonian thought yet to reach print.[5]

Perry does not believe that:

> there was an anarchistic wing — that is, a few identifiable anarchists — in the antislavery movement. I would argue that certain of the most basic ideas honored throughout abolitionism turned out in experience to have anarchistic implications . . . . Besides attacking violence, institutional religion, and human government, they occasionally tried to establish new, noncoercive styles in human relationships. This quest led them to departures in religion, community life, marriage, spiritualism, and even political parties. But the quest was so varied and inconsistent that it would be difficult to define an anarchistic wing of abolitionism. We are on safer ground, I think, in taking note of the importance of the problem of authority in antislavery ideology and then in recognizing a wide range of attempted solutions to that problem in the lives of abolitionists.[6]

First of all, what does Perry mean by anarchy? It is, as he admits, a highly ambiguous term, one that ordinarily has been vilified as a philosophy of disorder leading to violence, pandemonium, and license. But as perceived by Proudhon, the French social thinker, by Tolstoy, and, indeed, by some American antislavery radicals, anarchy was the secret of order, not chaos. Proudhon, a contemporary of

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American abolitionists, did not influence them in any way. But Perry compares Proudhon's ideas with those of American nonresistance and discovers many valid parallels. Proudhon's thought contained three basic premises: (1) that the coerciveness and violence of government indicate that it is evil; (2) that law is offensive; and (3) that government is unnecessary to produce a harmonious and just society. While there is no necessity to apply the phrase "unequivocal anarchism" in a Proudhonian sense to the Garrisonian nonresistance, definite affinities in outlook do exist. As Perry phrases it: "Some abolitionists had come to believe that the Biblical injunctions against violence meant that Christians had to renounce all manifestations of force, including human government; this is the belief we call nonresistance."[7]

While such a view contains anarchistic overtones, Garrisonian nonresistants resented the charges of "no-governmentism" attributed to them, and "insisted that they were striving for, and placing themselves under the only true and effective government, the government of God. They maintained that they opposed not government, but human pretensions to govern."[8] By becoming regenerate, men would become free of ordinary shackles and restraints and develop noncoercive, spontaneous, voluntary relationships that not only would lead to harmony, but would usher in the millennium, the kingdom of God on earth. As Perry concludes, "With their minds set on the government of God it was possible for abolitionists to seek an end to slavery, to call for governments of perfect moral purity or to say . . . that human government was no more necessary than sin."[9]

There is, however, still another aspect of nonresistant anarchism that needs to be stressed — the potential for internalized "social control." Henry Clarke Wright, the chief theoretician of nonresistance, argued (in Perry's words) that "if one is owned by God and therefore free of usurped coercive authorities — controls are internalized." As Wright phrased it, "The action of each human body must be controlled by a *power within it* — or by a power without it — by an Interior or by an Exterior power."[10] The potential for individual self-control was not appreciated by contemporary opponents who viewed the extreme libertarianism of nonresistance as dangerously disruptive to social stability because of its strong indictment of institutions such as civil government. Although Wright was a "belligerent nonresistant, a combative, divisive figure," he also urged "mankind to be calm and harmonious." In Wright's view, nonresistance was more than a pacifist doctrine. He was self-conscious enough to realize that "it was a form of restraint as well as a form of expression: it represented his own victory over murderous feelings" which empowered him through professions of pacifism and love "to show the blood on his brother's hand and prove his own innocence." In contrast to some anarchists and pacifists, Wright did not view human nature as benign. As Wright explained, "combativeness and destructiveness are essential parts of our nature, that our guilt lies not in the possession, but in the abuse of these propensities; and they are to be regulated and not destroyed." The key was to seek "vengeance" not against individuals, but rather against principles and institutions that were corrupt.[11]

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Perry analyzes a variety of manifestations of anarchism or anarchistic tendencies within the American antislavery movement: come-outers, the Hopedale Community, the New England Non-Resistance Society, no-organizationists, libertarian deists, political secessionists, and others. These groups frequently differed greatly in theory and practice — oftentimes in ways that qualified their anarchism; but they all shared the belief that "force violated the scheme of law that God had laid out for the world." Of all the groups, "the nonresistants probably gave this conviction its sharpest statement."[12]

Yet even in the ranks of the New England Non-Resistance Society, a wide range of opinion existed; and, more importantly, their convictions often reflected ambiguity, contradiction, or paradox. For example, "the theoretical consequences of the government of God were clear enough, but the practical applications were problematical."[13] It was clear that a nonresistant should not vote nor hold office. But should one refuse to testify in court, to pay taxes, to use banks chartered by civil government? Garrison even believed that a man, when called to militia duty, should refrain from engaging in civil disobedience. Garrison paid a fine for refusing to serve, believing that the state bore the responsibility with what it did with the money. In brief, Perry writes: "Nonresistance, quite simply, did not offer a comprehensive practical understanding of the evils of government, of anarchistic alternatives to the existing arrangements, or of the duties of nonresistants in the present dispensation. What really mattered to the nonresistant was the declaration that the only proper government was divine."[14]

Moreover, even though nonresistants were not supposed to vote, they "were seldom indifferent to the results of elections, as might have been expected of a movement which held even republican government to be a usurpation of God's throne." In one issue of *The Liberator*, Garrison both urged antislavery men to vote against proslavery candidates for Congress, and "ridiculed a vote for either presidential candidate." At times, Garrisonian nonresistance sounded "more like an instrument of political influence than a declaration of independence from government." Perry observes that the source of confusion as regards politics stemmed in part from the uncertainty of the Garrisonians as to whether nonresistance "was merely one among many other secular reforms or the most fundamental and divine of all reforms."[15] Phrased another way, the Garrisonian nonresistants attempted the almost impossible task of fusing "the quietistic attitude of nonviolence with the revolutionary purpose of millennial perfectionism."[16] As a result, nonresistance declined in importance as the Garrisonians would not allow their commitment to the abolition of slavery to be circumvented by their quest for personal liberation from sin.

If, as we have observed, contradictions, ambiguities, and ambivalence regarding violence were present in nonresistant abolitionist thought from the outset, we are nevertheless faced with explaining more precisely why it was not until the period between the Mexican War and John Brown's Raid on Harpers Ferry in 1859 that abolitionist acquiescence in or militant advocacy of "righteous violence" became dominant, if not universal.

In part, abolitionist receptivity to violent means can be explained as a "stimu-

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lus-response'' reaction to the growing sectional crisis over slavery and slavery expansion.[17] Numerous abolitionists, while condemning the Mexican War, nevertheless expressed the hope that the American Army would incur heavy losses and be repelled by Santa Anna and his legions. The strengthened Fugitive Slave Law of 1850 also escalated demands for physical opposition. As the Garrisonian Samuel J. May exhorted: ''If you are fully persuaded that it would be right for you to maim or kill the kidnapper who had laid hands upon your wife, son or daughter, or should be attempting to drag yourself away to be enslaved, I see not how you can excuse yourself from helping by the same degree of violence, to rescue the fugitive slave from the like outrage.''[18] And Frederick Douglass, who had earlier broken with the Garrisonian circle and abandoned pacifist principles, stated in 1852 that ''the only way to make the Fugitive Slave Law a dead letter [is] to make a half dozen or more dead kidnappers.''[19] When guerilla warfare broke out in ''Bleeding Kansas'' in the mid-1850's and nonresistant Charles Stearns wrote to Garrison that if ''nonresistance is not a safe principle it is not a true one,''[20] Garrison staunchly responded that Stearns had been frightened out of his commitment to pacifism. But Garrison's close colleague, Wendell Phillips — revealing the conflict that had developed between his ''head'' and his ''heart'' (that is, his intellect and his emotions) — agreed with Stearns. ''I believe in moral suasion,'' Phillips said. ''I believe the age of bullets is over. I believe the age of ideas is come. . . . Yet, let me say in passing, that I think you can make a better use of iron than forging it into chains. If you must have metal, put it into Sharp's rifles.''[21]

It was John Brown's raid, however, that produced the greatest reaction, the largest number of defections from pacifism. Lydia Maria Child declared: ''All I know, or care to know, is that his example stirred me up to consecrate myself with renewed earnestness to the righteous cause for which he had died so bravely.''[22]And Henry Clarke Wright, undoubtedly the most brilliant nonresistant theorist, recanted in 1859 when he proclaimed that ''resistance to slaveholders and slavehunters is obedience to God, and a sacred Duty to man'' and that ''it is the right and duty of the North . . . to instigate the slaves to insurrection.''[23]

Although the ''stimulus-response'' phenomenon goes far toward explaining the abandonment of nonviolence among an increasing number of abolitionists, there had to have been, as we have noted, ambivalent feelings toward violence in the first place. But there was also an important ideological component in abolitionist thought, an intellectual loophole, which permitted nonresistants who had not themselves abandoned the principles of nonviolence to acquiesce in or condone violence on the part of others. This, of course, was the nonresistants' emphasis upon the idea of private judgment or individual accountability to God. In essence, Garrisonian emphasis upon the uncontested sovereignty of God meant that the individual must follow his own best light. An explicit statement of this doctrine was made by Bronson Alcott in 1839 when he said:

> What guide have I but my conscience: Church and State are responsible to *me*; not I to them. They cease to deserve our veneration from the moment they

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> violate our consciences. We then protest against them. I believe that this is what is now going on. . . . I look upon the Non-Resistance Society as an assertion of the right to self-government. Why should I employ a church to write my creed or a state to govern me? Why not write my own creed? Why not govern myself?[24]

In other words, nonresistants emphasized the contrast between their ideal of noncoercion in all human affairs with the violent reality of American society. This distinction allowed them to condemn violence in the abstract while spurring those who in good conscience advocated violence to employ physical resistance on behalf of the just end of the abolition of slavery. As William Lloyd Garrison put it, "We are taking the American people on their own ground and judging of them by their own standard."[25] The right of private judgment thus allowed nonresistants a brilliant, if not very logically consistent, agitational tactic: on the one hand they condemned violence, but on the other supported its use against slavery. As Garrison argued to the unconvinced pacifist Adin Ballou during the Civil War, "Although nonresistance holds human life in all cases inviolable, yet it is perfectly consistent for those professing it to petition, advise and strenuously urge a pro-war government to abolish slavery solely by the war-power."[26]

In addition, there are still other factors which help to explain the repudiation of pacifism by an increasing number of nonresistant abolitionists. The use of moral suasion in the 1830's and early 1840's (which was accompanied by millennial expectations of creating God's kingdom here on Earth) simply had not worked. In the minds of abolitionists, the "slave power" was not in decline, but was advancing agressively on all fronts. Nor had they succeeded in influencing most of the nation's churches and benevolent societies to adopt an antislavery stance. Lack of apparent success caused among abolitionists feelings of failure and powerlessness, or what historian Lawrence J. Friedman has called a sense of "fragmented personal selfhood." The resort to violence transformed their original missionary impulse based on moral suasion into a crusade for righteous violence, a Manichean quest to destroy evil. As Friedman put it, in referring to the Unitarian minister William Furness: "Whereas unmodified moral suasion doctrines had faltered and had left him with a deep sense of personal inadequacy, the violent means of devout warriors promised to secure God's kingdom on earth."[27]

Finally, Friedman talks in terms of the old immediatists' "search for conviviality" with (acceptance by) a new generation of abolitionist leaders such as Theodore Parker and Thomas Wentworth Higginson who had not been influenced by the nonresistant strains in their thought. In Friedman's words, as the pioneer abolitionists "sought to build social bridges with more moderate antislavery Northerners and to retain harmony with the younger generation of abolitionist, they realized that old peace principles kept them isolated, but defense of violence did not."[28]

Yet, Friedman's emphasis on the "search for conviviality" as a partial explanation for the abandonment of nonviolent principles is somewhat suspect. His argument tends toward psychological reductionism: that is, his explanation

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posits a subconscious reaction which relies more on psychological theory than on persuasive evidence. In fact, old-line immediatists had courted social ostracism and, in a few instances, martyrdom itself in their unremitting commitment to the cause of the slave. Why, then, should we accept the view that for the sake of popularity they would willingly (if subconsciously) compromise, in the 1850's, those values and beliefs for which they had paid so dearly in personal terms during the 1830's and 1840's, especially when we have assembled a variety of other reasons — both ideological and psychological — which do not depend upon theoretical constructs lacking stong evidential support?

The outbreak of war itself convinced still other nonresistants to abandon their pacifist principles. When confronted by charges that the Civil War was not a war to free the slaves, abolitionists nevertheless expressed their hope and belief that in time the war could be transformed into a righteous crusade to destroy evil. In the spirit of "The Battle Hymn of the Republic," Garrisonian Lydia Maria Child was "convinced that this is the great battle of Armageddon between the Angels of Freedom and the Demons of Despotism."[29] Abolitionists saw the war as a heavenly retribution on a sinful people. To regain divine favor, Americans would have to undergo a bloody expiation, and if they proved worthy they could remake the nation into a model Christian republic that would be an example to the world. Nonresistants viewed slavery as the example par excellence of sinful coercion, and by the advent of the Civil War it became clear that most desired slavery's extinction even at the cost of a national bloodletting. The nonresistant Stephen Foster had earlier pointed out the direction that much abolitionist sentiment would follow when he militantly commented on the Fugitive Slave Law that he would "rather a hundred lives should be sacrificed than that one fugitive should be carried back to bondage."[30]

In conclusion, it must be said that, if the concept of righteous violence became the dominant view of nonresistants, a minority still clung tenaciously to their original pacifist beliefs. Adin Ballou, the founder of the nonresistant Hopedale Community, was perhaps the most prominent among them. In response to Henry Ward Beecher's charge that nonresistants were cowards, Ballou asked if it was not "absurd twaddle" for Christians to argue that it was moral to kill their enemies if it was done "in pure love, with holy affection, for the sake of justice."[31] The most significant group of nonresistants who conscientiously objected to the war were young, second generation Garrisonians, including Ezra Heywood, Francis and Wendell Phillips Garrison, Alfred Love, John Wesley Pratt, and Moncure Conway. With quintessential nonresistant logic, Heywood declared that the draft law must be disobeyed because it was "plainly in conflict with divine law."[32] Although William Lloyd Garrison supported the war effort and conscription, he argued that non-voting conscientious objectors, whether church members or not, should be exempted from military service. It is true that Garrison respected his son George's personal decision to enlist in the army, but his ideological sympathy was clearly with his sons Francis and Wendell Phillips who were conscientious objectors.

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The case of Moncure Conway, scion of a Virginia slaveholding family, is instructive because it illustrates that William Lloyd Garrison and Wendell Phillips and most other nonresistants valued their commitment to the Union war effort before their peace principles. When on a mission to England to stir up British abolitionist sentiment in favor of the Union cause, Conway startled his compatriots with his proposal to the Confederate commissioner, James M. Mason, that if the South would emancipate their slaves, the "abolitionists and antislavery leaders of the Northern States shall immediately oppose the further prosecution of the war on the part of the United States government, and, since, they hold the balance of power, will certainly cause the war to cease by the immediate withdrawal of every kind of support from it and with its secession a restoration of peace and the independence of the South."[33] Conway's statement raised a furor in both American government and abolitionist circles. In a somewhat exaggerated response Wendell Phillips remarked: "Moncure Conway does not represent one single man on this side of the Atlantic."[34]

What Conway had not understood was that the Garrisonian slogan of the 1850's – "No Union with Slaveholders" — was not simply a device to exonerate themselves from personal complicity with sin, but a political tactic to counter southern threats of secession. In the final analysis, many abolitionists were also committed nationalists, believers in an American nation endowed with a unique mission in the world. In historian Peter Walker's words, "The political Union was an arena in which a providential moral drama was being enacted." And without Union this "morality play was impossible."[35] It is little wonder then that the attempts to apply the principles of nonresistance failed to survive, and that pacifist Leo Tolstoy in the late 1880's and 1890's learned to his sorrow that the American version of Christian anarchism had withered and died.[36]

NOTES

1. Alice Felt Tyler, *Freedom's Ferment: Phases of American Social History from the Colonial Period to the Outbreak of the Civil War* (Minneapolis: University of Mineapolis Press, 1944). For a recent update, see Ronald G. Walters, *American Reformers, 1815–1860* (New York: Hill and Wang, 1978).
2. Quoted in Robert H. Abzug, *Passionate Liberator: Theodore Dwight Weld and the Dilemma of Reform* (New York: Oxford University Press, 1980), p. 93.
3. *Ibid.* For an insightful essay on immediate abolitionists' attitudes toward slave insurrection, see Robert H. Abzug, "The Influence of Garrisonian Abolitionists' Fears of Slave Violence on the Antislavery Argument, 1829–1840," *Journal of Negro History* 45 (1970): 15–28.
4. Although the first generation of immediate abolitionists embraced moral suasion as the optimum means of social change during the 1830's, abolitionists differed from early on as to whether there were situations where physical resistance might be legitimately employed. The pacifist Garrisonians condemned the martyred Reverend Elijah Lovejoy for his resort to weaponry in defending his abolitionist press from a proslavery mob in Alton, Illinois, but by a two-to-one vote the annual meeting of the American Anti-Slavery Society in 1838 refused to censure Lovejoy's actions.

   We would like to suggest that a contributing factor in the abolitionist schism of 1837–1840, but one overlooked by historians, was the clash of incompatible values on the role of violence. The schism resulted from a reformulation of strategy and tactics initiated by William Lloyd Garrison in the face of a nationwide antiabolitionist backlash during the mid-1830's. Polarization

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over the issues of political action, women's rights, and the legitimacy of civil government factionalized the abolitionists, so that by 1840 three distinct groups had coalesced — the Garrisonian nonresistants who then dominated the American Anti-Slavery Society, the politically engaged Liberty Party supporters, and the backers of Lewis Tappan's American and Foreign Anti-Slavery Society who tended to be religiously orthodox. From the perspective of their Christian anarchism, Garrisonians denounced physical resistance as a violation of divine law. In turn, anti-Garrisonian abolitionists, though in common opposition to much of Garrison's post-1837 ideology, split on the issue of violent means. The founders of the Liberty Party such as Alvan Stewart, Henry Stanton, and Elizur Wright showed an early receptivity to what they regarded as the justifiable use of violence. The anti-Garrisonian Lewis Tappan initially opposed their Party and instead directed his efforts to creating the American and Foreign Anti-Slavery Society in 1840, but by 1844 Tappan and some of his supporters joined the Liberty Party. Tappan nevertheless maintained his peace principles until the outbreak of the Civil War. It appears to us that the existence of differing attitudes toward violence and nonviolence helps to explain what amounted to a tripartite split in abolitionist ranks by 1840. For a revisionist interpretation of the abolitionist schism, see Richard O. Curry and Lawrence B. Goodheart, eds., "The Complexities of Factionalism: Letters of Elizur Wright, Jr. on the Abolitionist Schism, 1837–1840," *Civil War History* (forthcoming, September 1983).

5. The two books by Lewis Perry are: *Radical Abolitionism: Anarchy and the Kingdom of God in Antislavery Thought* (Ithaca, N.Y.: Cornell University Press, 1973), and *Childhood, Marriage and Reform: Henry Clarke Wright, 1797–1870* (Chicago: University of Chicago Press, 1980).
6. Perry, *Radical Abolitionism*, pp. x–xi.
7. *Ibid.*, p. 57.
8. *Ibid.*
9. *Ibid.*, pp. 45–46.
10. Perry, *Henry Clarke Wright*, p. 39.
11. *Ibid.*, pp. 86–87.
12. Perry, *Radical Abolitionism*, p. 232.
13. *Ibid.*, p. 76.
14. *Ibid.*, p. 78.
15. *Ibid.*, pp. 78–80.
16. *Ibid.*, p. 70.
17. For a perceptive discussion of the "stimulus-response" thesis, see John Demos, "The Antislavery Movement and the Problem of Violent 'Means,' " *New England Quarterly* 37 (1964): 501–26. And for a theoretical discussion of how violence becomes socially and psychologically sanctioned, see Herbert C. Kelman, "Violence without Restraint: Reflections on the Dehumanization of Victims and Victimizers," in George M. Kren and Leon H. Rappoport, eds., *Varieties of Psychohistory* (New York: Springer, 1976), pp. 282–314.
18. Quoted in Peter Brock, *Pacifism in the United States from the Colonial Era to the First World War* (Princeton: Princeton University Press, 1968), p. 671.
19. Quoted in Jane H. and William H. Pease "Confrontation and Abolition in the 1850s," *Journal of American History* 58 (1972): 928–29. Douglass had observed, "I was a Non-Resistant 'til I got to fighting with a mob in Pendleton, Indiana in 1843. . . . I fell never to rise again, and yet I cannot feel I did wrong" (quoted in Leslie F. Goldstein, "Violence as an Instrument for Social Change: The Views of Frederick Douglass, 1819–1895," *Journal of Negro History* 41 [1976]: 64).

Although this essay is primarily focused on nonresistant abolitionists who were mainly whites, it is important to note that northern black abolitionists such as David Walker, Henry Highland Garnet, and Charles L. Remond among others were in the vanguard of those justifying the use of violence to overthrow slavery. Other Afro-Americans such as the slave insurrectionary Nat Turner, the fugitive slaves who killed a pursuing federal marshal at Christiana, Pennsylvania in 1851, and the liberators who forcibly freed the alleged fugitive Shadrack (Fred Wilkins) from a Boston courtroom in 1852 actively employed physical resistance to overcome radical oppression. As the specially marked victims of slavery and the Fugitive Slave Law, black abolitionists had fewer intellectual qualms and less moral reluctance in wholeheartedly endorsing slave rebellion or in legitimizing violent opposition to oppressive federal statutes than their white nonresistant counterparts. An introduction to the black abolitionists is best approached through Benjamin

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Quarles, *Black Abolitionists* (London: Oxford University Press, 1969); and Jane H. and William H. Pease, *They Who Would Be Free: Blacks' Search for Freedom, 1831–1861* (New York: Antheneum, 1974).

20. Quoted in Demos, "Antislavery Movement," pp. 522–23.
21. Quoted in Lawrence J. Friedman, *Gregarious Saints: Self and Community in American Abolitionism, 1830–1870* (Cambridge: Cambridge University Press, 1982), p. 210.
22. Quoted in *ibid.*, p. 217.
23. Quoted in Demos, "Antislavery Movement," pp. 523–24.
24. Quoted in Lewis Perry, "Versions of Anarchism in the Antislavery Movement," *American Quarterly* 20 (1968): 771.
25. Quoted in Ronald G. Walters, *The Antislavery Appeal: American Abolitionism after 1830* (Baltimore: Johns Hopkins University Press, 1976), p. 30.
26. Quoted in Brock, *Pacifism in the United States*, p. 699.
27. Quoted in Friedman, *Gregarious Saints*, p. 216.
28. *Ibid.*, p. 222.
29. Quoted in Brock, *Pacifism in the United States*, p. 697.
30. *Ibid.*, p. 678. For a similar development in the expression of militant nationalism, see James H. Moorhead, *American Apocalypse: Yankee Protestants and the Civil War, 1860–1869* (New Haven: Yale University Press, 1978).
31. Quoted in Carleton Mabee, *Black Freedom: The Nonviolent Abolitionists from 1830 through the Civil War* (London: Macmillan & Co., 1970), p. 365. For a related work, see Sheldon Richman, "The Anti-war Abolitionists: The Peace Movement's Split over the Civil War," *Journal of Libertarian Studies* 5 (1981): 327–40. It is instructive to point out here the argument of Lysander Spooner. Although not a Garrisonian nor a pacifist, Spooner, a leading libertarian anarchist, represented another perspective on the issue of violence versus nonviolence. He contrasted the personal right to employ violence to combat slavery through voluntary action such as John Brown's raid with the Civil War, which represented coercive state-sponsored violence. See A. John Alexander, "The Ideas of Lysander Spooner," *New England Quarterly* 23 (1950): 212–13; and Perry, *Radical Abolitionism*, pp. 205–208.
32. Quoted in Mabee, *Black Freedom*, p. 346.
33. Quoted in Peter F. Walker, *Moral Choices: Memory, Desire, and Imagination in Nineteenth-Century American Abolitionism* (Baton Rouge: Louisiana State University Press, 1978), p. 16.
34. *Ibid.*, p. 3.
35. *Ibid.*, p. 11.
36. But if the religious strain of libertarian individualism had expired by the end of the nineteenth century, it had been replaced by secularized versions — doctrines of free thought, free love, and individualist anarchism. Indeed two longtime abolitionists, Elizur Wright and Parker Pillsbury, held executive offices in the National Liberal League, the leading free-thought organization of the 1870's, which shows a strong linkage between pre-war and post-war concerns with personal freedom and civil rights. For related discussions, see Eric Foner, "Radical Individualism in America: Revolution to Civil War," *Literature of Liberty* 1 (1978): 5–29; and Wendy McElroy, "The Culture of Individualist Anarchism in Late Nineteenth-Century America," *Journal of Libertarian Studies* 5 (1981): 291–304.

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An Economic Analysis of the Norris-LaGuardia Act, the Wagner Act, and the Labor Representation Industry*

by Morgan O. Reynolds

Department of Economics, Texas A & M University

> From a state in which little the unions could do was legal if they were not prohibited altogether, we have now reached a state where they have become uniquely privileged institutions to which the general rules of law do not apply. They have become the only important instance in which governments signally fail in their prime function — the prevention of coercion and violence.
>
> F. A. Hayek[1]

Economists have been relatively silent about the legislation from the 1930's which supports unionism and collective bargaining in the United States. A failure to apply economic analysis to the Norris-LaGuardia and Wagner acts has allowed a consensus about this legislation to develop among labor writers, basically by default. Expressed in terms of established economic theory, most accounts appear to rest upon two central propositions: (1) employees and employers are natural antagonists and employers have a powerful advantage over employees (labor monopsony), and (2) public policy ought to promote unions and collective bargaining in order to offset this inequality (bilateral monopoly). Even if one accepts proposition 1 as factually correct, which many economists would not, acceptance of policy prescription 2 would not follow because it would have to be compared with alternative measures, for instance, policies intended to encourage more competitive bidding for labor services.

Most labor scholars have approved of the labor legislation of the 1930's, although they differ in detail and sometimes express disappointment at the administrative evolution of the laws.[2] The questions that labor writers ask and the data which they use have been sharply limited by their implicit acceptance of the monopsony model and their shared conviction that greater involvement by gov-

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ernment and labor unions in determining wage rates and working conditions were favorable departures from the *status quo ante*.

On the other side of the issue, one of the few economists to explicitly comment on the legislation has been W. H. Hutt:

> The Norris-LaGuardia and Wagner acts will, I predict, come to be regarded by future historians as economic blunders of the first magnitude. They were worked for and acquiesced to under motivations of almost unparalleled sordidness and cynicism combined with the highest, misguided idealism.[3]

Professor Hutt's provocative characterization cannot be confidently accepted or rejected presently because we lack a major analysis of the legislation within the framework of accepted economic theory and public choice analysis. The purpose of this paper is to remedy this deficiency. Specifically, my aim is to (1) describe the main features of Norris-LaGuardia and Wagner in terms of standard economic theory and the emerging theory of regulation, (2) analyze the direct effects of the laws, and (3) explain why the legislation passed when it did.

The basic contention, reduced to its core, is that the evidence is consistent with the view that self-interested political activists — unionists, academics, bureaucrats, politicians, and a minority of big businessmen — played major roles in fostering a major expansion in the labor representation industry, an event essentially in their financial and nonfinancial interests. Some proponents genuinely, even altruistically, believed that unionism would raise the standard of living in this country. But the labor literature generally posits political idealism as the sole motive of unionists and their political allies, uncritically accepting their good intentions at face value. The same view is rejected for political opponents of the legislation, who generally are viewed as motivated by self-evident financial gain rather than deep ideological commitment. The asymmetric treatment has left the possible evidence for academic and political profits from the labor representation industry largely untouched. This paper proposes to apply the theory of self-interest and pressure groups in the search for the causes and effects of the Norris-LaGuardia and Wagner Acts.

I. The Background

Labor unions historically were difficult to organize and sustain in the United States. Common obstacles to forming any private combination designed to raise price or restrict supply intruded. The difficulties were especially severe in U. S. markets for labor services, characterized by large numbers of buyers and sellers, ease of entry and exit, high turnover, high mobility, geographic dispersion, active resistance among buyers, and differences of opinion about collectivism and the use of force. The courts also tended to restrict union tactics like threats, violence, and interference with voluntary trade; unionists, therefore, were prominent demanders of governmental privilege, and mounted persistent and intensive political campaigns for favorable legislation.

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Prior to World War I, unionists had relatively little to show for their political investments. From 1842 onwards unions had the clear legal right to exist and workers could join such self-help organizations, but employers were under no legal obligatrion to deal with them. The courts also tended to make little distinction between union and business restraints on competition. For example, the courts ruled that union actions in a boycott organized by the United Hatters of Danbury, Connecticut, against the products of D. E. Loewe and Company (1908) violated the Sherman Anti-Trust Act of 1890. The boycott was held to be in restraint of trade and individual members were held responsible for the union's acts and for assessed damages and costs totaling $252,000.

In 1912, Congress supplied some union assistance with the Lloyd-LaFollette Act, which encouraged postal workers to unionize and compelled bargaining by the Post Office. Then in 1914 Congress attempted to supply a very broad range of favors for unions by passing the Clayton Act. It exempted unions from the 1890 Sherman Anti-Trust Act, restricted the use of injunctions in labor disputes, and provided that picketing and similar union activities were not unlawful. Samuel Gompers optimistically hailed the Clayton Act as labor's Magna Carta, but subsequent judicial rulings quickly neutralized the prounion provisions.

The national emergency of World War I provided much of the experience and precedent for subsequent labor legislation, as well as other cartel-like economic policies. Historian William E. Leuchtenburg, for instance, points out that:

> The panoply of procedures developed by the War Labor Board and the War Labor Policies Board provided the basis in later years for a series of enactments culminating in the Wagner National Labor Relations Act of 1935.[4]

The War Labor Board and the War Labor Policies Board, the latter led by Felix Frankfurter and modeled on a directive by Franklin D. Roosevelt, who represented the Navy on the Board, proclaimed governmental support of unions and enforced prounion measures upon industry.[5] The Boards, for instance, ordered the establishment of "work councils" composed of employee representatives, seized defiant enterprises, and in one case the government actually created a union, the Loyal Legion of Loggers and Lumbermen, and forced lumbermen to join as part of the battle against the International Workers of the World (IWW). The Loyal Legion collapsed after World War I despite government efforts to keep it alive. Just as the War Industries Board, led by Bernard M. Baruch and General Hugh S. Johnson, was the forerunner to the 1933–35 National Industrial Recovery Act, headed by Hugh S. Johnson, the War Labor Boards were predecessors to Section 7(a) of the NIRA and the National Labor Relations Act of 1935.

Leuchtenburg supports the contention that the war gave new influence and power to professors who, for the first time, swarmed into Washington with something to do.[6] Leuchtenburg claims that by the 1930's professors and university-trained intellectuals played crucial parts in shaping legislation and manning the new agencies which their legislation developed:

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> The passage of the Wagner Act in 1935, for example, resulted less from such traditional elements as presidential initiative or the play of "social forces" than from the conjunction of university trained administrators like Lloyd Garrison within the New Deal bureaucracy with their counterparts like Leon Keyserling in Senator Wagner's office. This new class of administrators, and the social theorists who had been advocating a rationally planned economy, found the war an exciting adventure.[7]

The first durable help for unions was the Railway Labor Act of 1926. The labor disputes which periodically erupted on the railroads were highly visible, violent, and politically unpopular. Although the interstate commerce clause of the U. S. Constitution (as interpreted then) restricted the ability of the national government to intervene in most economic affairs, Congress had the unchallenged power to regulate interstate commerce. A sequence of federal laws regulated railway labor beginning in 1888, and the 1926 law was passed by Congress in a form almost identical to that agreed upon by the railroad unions and the major railroads. The Act, with an amendment in 1934, basically mandated collective bargaining for all interstate railroads and set up machinery for governmental intervention in labor disputes.

This was an obvious case of government enforcement of monopoly arrangements in an industry. Already-unionized railroads found it comfortable to impose compulsory collective bargaining on *all* interstate railroads, some of which resisted union pressure better than others. The Interstate Commerce Commission, in turn, fixed freight rates for railroads based on "costs," which were higher due to unions. Thus, railroad wage and price determinations were effectively transferred from the economic marketplace to the political marketplace.

During the confusion of the Great Depression, Congress supplied six major pieces of labor legislation favored by unionists: Davis-Bacon, Norris-LaGuardia, National Industrial Recovery Act, National Labor Relations (Wagner) Act, Walsh-Healey, and Fair Labor Standards Act. Three of the bills authorized direct federal regulation of wages, hours, and working conditions in various sectors of the economy (Davis-Bacon, Walsh-Healey, and Fair Labor), and I say no more about them here.[8]

NIRA was a system of industry codes or cartel agreements sanctioned by the national government in 1933 and was intended to push up prices throughout the economy. The rationale was that falling prices were causing the depression and a reversal of "excessive" competition would hasten recovery. Although short-lived, the Act included Section 7(a) which broke important ground for national labor policy by declaring "the right [of employees] to bargain collectively through representatives of their own choosing without interference, coercion or restraint on the part of the employer."[9] The favored theory was that falling wage rates caused purchasing power to decline, and powerful unions would reverse this decline. This theory ignores the fact that higher prices for labor services, ceteris paribus, reduce employment and thereby reduce output (real income).

In contrast to the wide scope of NIRA, the Norris-LaGuardia and Wagner Acts

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were limited to promoting labor cartels and cartel-type bargaining in labor markets. The ability of unionists to interfere with trade or, to adopt the expression of the labor literature, use the weapons of labor, rests largely on immunities from damage suits and equity relief granted by Norris-LaGuardia and, more importantly, on governmental machinery set up by the Wagner Act to impose labor representation and collective bargaining procedures on those employees and enterprises who would otherwise refuse to participate in unionism and collective bargaining. These laws have proven effective and durable, even though falling nominal wages and nominal purchasing power have not been notable problems for many years. It is no exaggeration to assert that American experience with nationwide labor representation is only fifty years old and mostly owes its existence to Norris-LaGuardia and Wagner.[10]

II. The Norris-LaGuardia Act

President Hoover signed the Norris-LaGuardia Anti-Injunction Act on March 23, 1932, after it had passed the House by a vote of 363 to 13 and Senate by 75 to 5. It was the culmination of a fifty-year campaign by trade unionists and their allies in the academic community against "government by injunction." The purposes of the Act were threefold:

(1) to declare nonunion oaths ("yellow-dog contracts") unenforceable in U.S. courts (Section 3);
(2) to relieve labor organizations from liability for wrongful acts under antitrust law (Sections 4, 5); and
(3) to nullify the equity powers of federal courts in labor disputes (Sections 7 through 12).[11]

A yellow-dog contract simply made nonunion status a condition of employment. Unionists labelled nonunion pledges "yellow-dog" because anyone who disagreed with union policies or was willing to pledge nonunion status for other reasons was a cowardly, yellow cur with its tail between its legs, in the divisive idiom of unionists. Norris-LaGuardia neither outlawed the existence of nonunion pledges as a condition of employment nor, indeed, prevented employers from firing employees who joined a union, but it did make the oaths unenforceable in U. S. courts. Aaron claims that there is no record of any legal action by an employer against an employee for breaching a yellow-dog contract.[12] Within three years, however, the Wagner Act went beyond Norris-LaGuardia to make it an unfair labor practice for an employer to dismiss or discriminate against an employee because of union membership or union activity.

Most writers accept the terminology of unionists to describe people who signed nonunion pledges, and also accept union lore about why employees signed pledges. Almost all textbooks and articles that discuss the issue refer to antiunion employers who "exacted" and "forced" the "infamous" yellow-dog contracts from employees.[13] The well-known case of Hitchman Coal & Coke Co. v.

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Mitchell usually is cited as the prime example. The facts do not support the conventional interpretation, however. The cartelized portion of the bituminous coal mining industry, located in western Pennsylvania, Ohio, Indiana, and Illinois, hired only UMW miners under a closed shop regime, although pay was no higher than in the nonunion, competitive part of the industry, located mostly in West Virginia and parts of Pennsylvania.[14] The UMW acted against nonunion mines because nonunion coal was underpricing cartel coal, especially in periods of slack demand.

The Hitchman mine in West Virginia opened in 1902 and operated as a nonunion mine until April 1, 1903, when the owners recognized the UMW because union officials threatened to shut down a unionized mine in Ohio operated by the same owners. A two-month strike, over pay, followed the next day. National officials of the United Mine Workers called a two-month strike again in the spring of 1904, imposing additional financial losses. The company operated on union terms until the UMW called another strike in 1906. When the company could not resolve the strike after two months, Hitchman reopened on a nonunion basis.

The ironic truth is that employees at Hitchman were as anxious to have the "yellow-dog" as company owners. Many nonunion miners were (and are) fiercely antiunion, more antiunion than their employers. Employees at Hitchman agreed to refrain from joining the union in exchange for assurance that the company would refuse to deal with the national union, hoping to avoid the disruptive union tactics which had already cost the employees so dearly in sacrificed wages. The employees accepted nonunion pledges, as did new hires, in order to resume their production and earnings.[15]

Why all the political agitation over yellow-dog contracts? They added nothing to the acknowledged legal right of employers to discharge workers for any reason, including union activity. Employment relationships were "at will" and could be terminated by either party at any time in that era, in the absence of agreements to the contrary. The few writers who raise the question conjecture that it gave employers a "psychological" edge, intimidated some workers, deluded workers into believing that they had a moral obligation to abide by a contract, or that the tactic discredited unionists.[16] Although these explanations may be true, they are rather vague, difficult to falsify, assume a continuing failure of workers to learn from experience, and apparently accept a quasi-Marxist belief in a natural antagonism between those two great abstractions, labor and capital. Furthermore, the proposed explanations do not explain the apparent secular pattern of yellow-dog contracts. Although systematic data do not currently exist, waves of nonunion oaths appeared to follow outbreaks of destructive strikes and boycotts, for example, during the widespread violence by railroad, coal miners', and garment workers' unions which triggered antiunion sentiment across the country in the 1920's. As written, signed yellow-dog agreements did not enhance an employer's direct advantages under the law, the explanation for their ebb and flow must lie elsewhere.

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A plausible hypothesis is that the agreements were in the mutual interest of employers and employees who accepted them, just as other aspects of an employment relationship are determined by mutual agreement in free markets. More employees would want oaths during periods of union violence because pledges could enhance the attractiveness of working conditions for those fearful of union-related conflict and violence. Effectively, pledges could reduce an employee's probability of becoming involved in a union dispute, by this thesis. From an employer's point of view, they were a form of full disclosure about working conditions and an economical means of improving working conditions for employees who wanted nothing to do with unions; nonunion requirements would reduce a firm's labor costs if they were popular with a substantial number of workers.

The Hitchman decision supports this hypothesis about the gains from nonunion oaths. Judge Dayton in a lower court opinion in September 1909, wrote:

> there was no controversy between the plaintiff and his employees. . . . there was between them a contract to maintain an 'open shop,' and no strike was desired or threatened by them, [which] removed this case from the field of controversy affecting the rights of members of unions. It is not a case where the labor union has any longer any legitimate interest or concern.[17]

In the six-to-three Supreme Court decision (1917), Justice Pitney wrote for the majority:

> In short, plaintiff was and is entitled to the good will of its employees. . . . The value of the relation lies in the reasonable probability that by properly treating its employees, and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations.[18] (Citations omitted)

Conversely, nonunion pledges would make the organizing of workers more difficult for unionists since people who wanted to avoid union conflict and involvement could claim contractual obligations to remain nonunion.[19] Yellow-dog contracts, by this view, were the result of government's frequent failure to protect people from union coercion and violence in labor disputes rather than due to vicious employers.

The second purpose of Norris-LaGuardia was to exempt labor unions from antitrust laws. Norris-LaGuardia effectively repealed the Sherman Act for labor unionists for all practical purposes, even in cases of aggressive violence to obstruct trade. Legitimate or *bona fide* unionists are not only immune from the laws prohibiting combinations and agreements in restraint of trade, they own an effective writ to interfere actively with commerce, immune from the equity injunction.[20] Direct and intentional prevention of shipment or delivery of goods in interstate commerce by labor unions was held *not* in restraint of trade in Apex

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Hosiery v. Leader. Secondary boycotts by unions in order to keep nonunion goods or goods produced by members of other unions out of the market was held immune from the Sherman Act in U. S. v. Hutcheson, provided the union acted in its self-interest and did not conspire with nonlabor groups. In Hunt v. Crumboch the Supreme Court adopted total immunity by a five to four vote. In this case an employer had antagonized union officials, and they responded by refusing to supply him with any labor. In dissent Justice Jackson wrote, "The Court now sustains the claim of a union to the right to deny participation in the economic world to any employer simply because the union dislikes him."[21]

This evolution illustrates a double standard which has developed since 1932 in antitrust: nonviolent and relatively ineffective price-fixing by businessmen, based on arguable evidence and economic theories, is vigorously prosecuted by the Department of Justice, the Federal Trade Commission, state agencies, and private plaintiffs, while industry-wide price-fixing by unionists, often accompanied by violence, is exempt, if not encouraged by government policy. Prior to Norris-LaGuardia there was little distinction in the legal treatment of union versus business restraints on competition.[22] After Norris-LaGuardia was passed and its constitutionality confirmed by the Supreme Court, the courts basically were forced to permit worker cartels to fix terms of employment, and then to try to regulate their behavior.

The third purpose and main object of Norris-LaGuardia was to eliminate equity relief by U. S. courts in labor disputes. Its importance derived from the fact that unionists use force to pursue their objectives and, consequently, others suffer damage. For example, Professors Cox and Bok write in their prominent textbook on labor law:

> counter-attack lay in concerted activities designed to injure the employer's business until he came to terms. If the employer refused to recognize the union, the union had to choose between acquiesence and resort to economic compulsion. Moreover, the employees of some establishments could be organized only by pressure from the outside and in such instances the strike, boycott and picket line were indispensable weapons.[23]

Repeated trespass on an individual's land ordinarily can be halted by injunction in courts of equity, an important remedy in the case of picketing and strikes whose purpose is to cut off public access to the business and inflict economic losses on the owner. Until the 1880's there were four legal remedies available to a private plaintiff who claimed to be a victim of union-induced damages: criminal conspiracy, tort law, criminal proceedings, and equity injunctions.

Employers could not expect redress through criminal conspiracy charges unless the unionists' actions involved physical coercion. There were only 18 convictions of unionists on conspiracy charges in the U. S. between 1806 and 1846 when the doctrine was at its peak.[24] In addition, relief was not speedy.

Tort law suffered from delays, difficulty in quantifying the monetary value of union damages, and the uncertain legal status of unions. Repeated suits for

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damages generally did not provide reasonable protection for owners of businesses because unions never incorporated, with the result that unions in most jurisdictions were private associations without legal standing to sue or be sued for damages. The evidence suggests that unions deliberately avoided incorporation to avoid legal responsibility for their actions.[25] Union treasuries and assets also were small relative to damages, further diminishing tort law as a remedy for union-caused damages.

Criminal prosecution had deficiencies as a legal remedy too. Since crimes are offenses committed against the state, private individuals must rely on local public authorities to efficiently investigate and prosecute offenders. The perennial inertia and inefficiency of public employees presented an obvious problem for private parties with a strong interest in the outcome. This problem was heightened in labor cases because officials in many jurisdictions either had a sentimental attitude toward "labor" or were reluctant to intervene in labor brawls because they involved immigrants and other "low characters." These tendencies were sometimes reinforced by mass assemblies of angry union members, mobs which left outnumbered police forces little choice, or by political cooperation secured through campaign money and electioneering for a sheriff or mayor. Even if unionists were convicted under criminal law, victims could expect no compensation.

Under these circumstances, the injunction had obvious advantages as a legal remedy for labor disputes. Equity courts had built a common law tradition, centuries old, for non-labor cases when retroactive money damages did not seem suitable, or where "the remedy at law would be inadequate," as it was expressed. Scholars do not completely agree on the date of the first injunction issued in an American labor dispute, but Edwin Witte counted 28 during the 1880's, 122 during the 1890's, 328 and 446 in the next two decades, and 921 in the 1920's.[26] The equity injunction gradually emerged as the primary legal remedy for victims of union violence during this period because it was timely and effective, just as it was in many non-labor disputes. An injunction temporarily restrained union actions pending a trial and this explains the intense union campaign against its use in labor disputes because once violence-ridden strikes were enjoined for a few days, they were difficult to revive, reorganize, and rekindle.

Most labor scholars refer to the "injunction abuse," as did many politicians of the era. Professor Irving Bernstein, for example, refers to "the cancerous mass of procedural abuse that the courts had spread with the labor injunction."[27] Sylvester Petro, however, could not find any evidence for "abuse" in the only detailed examination of cases since the fragmentary study by Frankfurter and Greene in 1930.[28] Petro's examination shows that the courts were circumspect, careful, and reluctant to issue injunctions in labor disputes. Petro analyzed all 524 reported federal and state injunction cases from the years 1880 to 1932 (a case usually went unreported if there was no subsequent legal action) and found that no primary strike for better terms and conditions of employment was ever enjoined as such; nearly the same was true of primary picketing by employees of the picketed

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establishment, except if the picketing was violent; and the same was true of strictly peaceable persuasion, except where it was part of a violent conspiracy.

Academic discussions usually fail to describe the violence, property destruction, and intimidation which prompted the issuance of injunctions by courts of equity in labor disputes in the first place. But in virtually every dispute, unionists were the aggressors: those beaten, bombed, and beseiged were nonunion, antiunion, and rival union employees, as well as the productive property of investors. To cite a 1902 example of union aggression from the court transcript:

> As Caldwell and Ball approached the point named they saw five or six men. Most of them they recognized as strikers. Ball believed there was to be trouble, but Caldwell thought not. The pickets stopped them, and asked them where they were going. Caldwell said, "To the shops." Then Caldwell said, "I tell you boys, we don't want any trouble. Now, I just come last Thursday, and as soon as I get money enough I will go back to Chicago." Immediately Caldwell was struck in the jaw, knocking him into the ditch. Ball started to assist Caldwell, when two men jumped on him. He got loose, and started to run, and fell down, when he was hit with a club. He finally got away, and threatened to shoot the assailants, but ran away, and then he was stoned. After Caldwell was down, he was either struck or struck at with a club. Caldwell got up, walked inside the gates, and in a few minutes was dead; murdered.[29]

Unionists do not entirely deny the historic use of violence. In fact, it is a central feature of the legend of "labor's bitter struggle" and its martyrs for the cause. Unionists claim, though, that employers were more guilty than unions. Undoubtedly, many employers were guilty of resistance to the demands of unionists, but if employers were as guilty of unlawful actions as unionists were, both unionists and labor scholars must explain why unions rarely sought, much less gained, equitable relief in the courts against the alleged depredations of employers.[30] The common answer is that judges were biased against unions by virtue of education, upper-class background, and cultural association with the "employer class." Such uniformity of temperament and complete absence of fair-minded individuals would be surprising in any occupational group, much less the judiciary, many of whom were schooled in the rule of law and the importance of impartiality. The real answer is that union suits for equitable relief simply could not pass the standard legal criteria for issuance. In virtually all labor disputes, unions, as the aggressors, could hope to demonstrate neither: (1) unlawful conduct by employers, nor (2) threat of irreparable injury, nor (3) lack of alternative, adequate remedies at law. Nor did unions have "clean hands" which parties must have to be granted equity relief.

The association between unionism and violence is clearly accounted for by basic economics. In order to push the prices of their members' services above open market wage rates, labor unions must restrict (cut off) the supply of labor to struck enterprises. The only effective way this can be done is through threats and violence because many U. S. workers are willing to defy picket lines and accept wages and working conditions below those demanded by unionists. As Henry

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George wrote in the nineteenth century, "Those who tell you of trades unions bent on raising wages by moral suasion alone are like those who would tell you of tigers that live on oranges."[31] The employer's (and consumer's) interest, by contrast, is to preserve access to a free labor market and maintain peaceful conditions so that work and production can proceed smoothly and economically.

Labor scholars assert that unions continually faced injunctions to restrain their strikes and gatherings, injunctions supposedly readily granted by complaint judges. The data show otherwise. During the years from 1881 to 1905 and from 1914 to the present, the Bureau of Labor Statistics recorded a number of work stoppages by examining the daily press and trade press, followed up by questioning of the parties involved.[32] Between the years 1881 and 1932, excluding 1906–1913 when reporting was discontinued, there were 72,888 reported work stoppages, virtually all of them union-organized strikes. There were 182 reported federal labor injunction cases from 1881 to 1932, or an average of 3.5 per year. Edwin Witte also compiled 508 cases for 1894–1932 of unreported federal labor injunction cases, substantially overlapping reported cases.[33] An equity decision goes unreported if the original order meets no objection and no appeal is filed by either party. Therefore, less than one percent of reported work stoppages (690 divided by 72,888) became federal labor injunction cases between 1881 and 1932. This is an upper estimate because 25 to 50 percent of all federal labor injunctions were issued in the railway shopcraft strike of 1922, which had 1,500 cases of violent assault to kill, 51 cases of dynamiting and burning railroad bridges, 65 reported kidnappings, and so on. The one-percent conclusion ignores injunctions granted by state courts; Witte claimed that 1,364 labor injunctions were issued on application by employers prior to May 1, 1931, in state courts, or less than two percent of all reported work stoppages. Therefore, fewer than three percent of all work stoppages resulted in injunctions by all courts against union actions, probably a modest figure relative to the impression conveyed by labor scholars and the potentially large number of labor disputes where private coercion and mob violence might have justified an injunction.

The Norris-LaGuardia Act also reinforced the one-sided nature of collective bargains by prohibiting injunctions against unions for breach of contract, which commonly means a no-strike pledge. Prior to Taft-Hartley in 1947, a contract between an enterprise and a union was really only binding on the enterprise (if it was binding on anyone) because unions could not be sued for breach of contract (or anything else for that matter), a phenomenon which Taft-Hartley has changed very little. To illustrate the continuing immunities of unions from damage suits, the Supreme Court recently ruled that a union which violates its statutory duty to represent a member fairly in a grievance cannot be required to pay punitive damages.[34] A jury had awarded $75,000 in punitive damages to a member of the International Brotherhood of Electrical Workers because the union had failed to process the employee's unfair dismissal grievance before a crucial deadline, thus depriving him of an opportunity to appeal.[35] In reversing the judgment, Justice Marshall wrote for the High Court that any remedy for victims of union miscon-

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duct must be consistent with the "overarching legislative goal" of the National Labor Relations Act, namely, "to facilitate collective bargaining and to achieve industrial peace." Punitive damage awards would not "comport with national labor policy" because they could "deplete union treasuries, thereby impairing the effectiveness of unions as collective bargaining agents," might curtail the broad discretion afforded unions in handling grievances, and could "disrupt the responsible decision-making essential to peaceful labor relations." In plainer language, unions are beyond the law which applies to everyone else in damage suits.

III. The Wagner Act

After the N.I.R.A. was struck down by the Supreme Court in the Schechter Poultry case of 1935 on the grounds that the Act delegated virtually unlimited legislative power to the President, almost identical labor regulations were adopted by the Congress, piecemeal, in surviving legislation like Walsh-Healey and Fair Labor Standards. But the most famous and important legislation was the Wagner Act, which passed by a 63 to 12 vote in the Senate and by an unrecorded voice vote in the House, and was signed by President Roosevelt on July 5, 1935. Roosevelt gave pens to Senator Wagner and William Green, President of the American Federation of Labor, whereupon Green declared that the legislation would prove to be the "Magna Carta of Labor of the United States," echoing Gompers' ill-fated statement about the Clayton Act twenty-one years earlier. Green, however, proved to be right in the sense that the legislation turned out to be the primary source of economic power for U. S. unionism, indeed of most unions' existence.

The Act declared that the policy of the United States Government is encouragement of the practice and procedure of collective bargaining, as well as protection of worker designation of representatives to negotiate terms and conditions of employment. The Wagner Act supplied six principal services to unionists:

(1) creation of a political board, the National Labor Relations Board, to enforce the Act,
(2) limiting buyer resistance to unionization by specifying "unfair labor practices" by employers,
(3) NLRB enforcement of majority elections for union representation,
(4) NLRB determination of eligible voters,
(5) NLRB enforcement of exclusive (monopoly) bargaining rights for certified labor representatives, and
(6) NLRB enforcement of union pay scales for all represented employees, whether union members or not.

The basic technique of the Wagner Act was to reduce drastically the cost of imposing labor representatives on enterprises and employees. Subsequent federal legislation modifying the Wagner Act (Taft-Hartley in 1947 and Landrum-Griffin in 1959) has not been so favorable to unions, but this can be easily exaggerated.

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Neither Taft-Hartley nor Landrum-Griffin tampered with the basic governmental services supplied to labor organizations. These amendments simply added regulations which expand government intervention to deal with effects of union power in the labor market. This is a familiar pattern in regulatory behavior because, once monopoly rents are created and enforced by government intervention, there is a tendency to dissipate rents in response to pressures by other interested groups.

The primary word to characterize the Board is discretion. Its members (expanded from three to five in 1947 by Taft-Hartley) are appointed by the President to five-year terms and approved by the Senate. The Board decides who votes in representation elections, investigates and decides complaints, has exclusive jurisdiction over unfair labor practices, preempts direct access to the courts in labor disputes, makes findings about facts which are conclusive in the event of appeals in the courts, issues cease and desist orders, reinstates employees with backpay, orders periodic reporting to the Board, has power of subpoena for evidence and investigation, and can reverse or modify its previous orders at will. Furthermore, at Board hearings "the rules of evidence prevailing in courts of law or equity shall not be controlling." Such administrative flexibility was desired by union lobbyists who wanted a political board which would be more sensitive to union political pressure than the courts were. The result has been an extraordinary series of reversals and changes in NLRB policies, especially with changes in Republican and Democratic administrations.[36]

The term "unfair labor practice" means any of five employer activities made unlawful under the Wagner Act (Taft-Hartley added a like number, though not equivalent, of unfair union activities). Essentially it was illegal for employers to resist unionization of their enterprises. The NLRB handles over 10,000 of these complaints per year. The theory is that unfair practices are akin to common law torts — an invasion of publicly declared rights or, more strictly speaking, behavior contrary to declared public policy. The notion is that the Act created rights and duties which were public and, therefore, enforceable by public agencies rather than private parties.

An election in a bargaining unit is normally held under terms of the National Labor Relations Act to determine "collective bargaining representation." If a union organization wins a simple *majority* of the valid votes cast in the final round, the victorious unionists become the exclusive agent for *all* employees in the unit, even if a majority does not vote for the union. The term "bargaining unit" is a misnomer because it is only a voting unit for purposes of "certification" of labor representatives. Actual bargaining units consolidate many such voting units to make monopoly gains feasible for labor representatives and/or members. The NLRB is not very restricted by the vague language of the Act in determining an appropriate unit, and the word "gerrymander" illustrates how important the exact boundaries of election districts can be in political competition. In recent years, managements and unions agreed on voting boundaries (eligible voters) in about 75 percent of cases, and the Board determined the voting unit in the remaining 2,000 cases per year. In earlier years, the NLRB consistently used its

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authority to help C.I.O. industrial unions win representation elections, much to the distress of the A.F. of L. NLRB policies continue to favor unionization over no union, in accord with the policy statement of the act. NLRB techniques to favor unionism include overturning union defeats due to "unfair" election tactics by employers, as defined by the NLRB, and disqualifying voters challenged by union officials, for example, part-time employees if a majority of them are known to be antiunion.

There are direct parallels between federal formation of cartels in agricultural and labor markets which illuminate NLRB techniques. In milk markets, for example, federal control was authorized by the Agricultural Adjustment Act of 1937 which, like the Wagner Act, replaced legislation passed in 1933.[37] The law allows dairy farmers to force marketing controls on bottlers or dairies, called "handlers" in the industry. Before the legislation, dairy farmers often tried to impose monopoly pricing through cooperatives but independent competition kept breaking out, despite milk strikes and violence among dairy farmers. Like the unionists, they argued that strikes, associated violence, and price instability were the undesirable consequences of competition and resistance by buyers.

Under the 1937 act, a proposed marketing order is presented to relevant handlers for their voluntary signatures. Naturally they refuse to sign because it restricts handlers to a monopoly supplier, but then the order is enforced by government if two-thirds of the milk producers or producers of two-thirds of the output sold within the market area vote for the proposal in a USDA election. Fluid milk prices are estimated to be 7 to 15 percent above competitive levels due to this scheme.[38]

Federal officials determine monthly price under a market order, in contrast to unionists, who are permitted to privately negotiate virtually any wages and working conditions they wish. Dairy producers, however, are allowed to negotiate prices, called a superpool premium, above those set by the federal administrator. Another difference is that the federal costs of administering a market order are paid by a tax on handlers. Since these costs must be covered by receipts in the long run, consumers of dairy products basically pay the cost of administering dairy cartels. NLRB costs for elections and enforcement, on the other hand, basically are paid by federal taxpayers rather than consumers of union-made goods.

The Wagner Act does not expressly compel employers to reach an agreement with a certified labor representative but the right to refuse is attenuated by the fact that employers are obligated to bargain in "good faith" with union officials, a phrase interpreted by the political appointees of the Board. To illustrate how the statute operates in practice, the Supreme Court recently ruled that in-plant food prices and services were mandatory subjects of bargaining, even if the food operation is operated by a third party. Justice White, writing for the Court, said that even though he anticipated that "disputes over food prices are likely to be frequent and intense," national labor policy supported the conclusion that "more, not less, collective bargaining is the remedy."[39]

In addition to fixing voting units and conducting elections for unionists, the

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NLRB enforces exclusive bargaining rights under the National Labor Relations Act. This is the minimum guarantee of union security because union officials are safe from rival unionists or employee decertification efforts for at least one year after a previous decertification vote. This legal situation is much like the historical meaning of the word "monopoly," a grant from the state of the exclusive right to sell some good. Exclusive bargaining is a legal barrier to entry in the labor representation industry, protecting incumbent unionists by raising the costs to rival unionists interested in competing for greater membership (called "raiding," one of many military terms in the vocabulary of unionism).

Exclusive bargaining delivers another service to unionists because the collective bargaining agreement must apply to all employees in a unit whether they are union members or not. A union's monopoly power would erode rapidly if individuals were free to reach individual agreements with employers which departed from union terms.[40] Some employees would agree to work for less than union wages or produce more output at union wages and an employer would substitute toward these employees. Unions also discipline the tendency of some employees toward "excessive production" by informal social pressure, as well as formal work rules backed up by the union's disciplinary powers — which, in turn, are effective only against its members, hence the importance of compulsory membership to the union. Government enforcement of collective conditions upon all employees in a bargaining unit relieves unionists of these dangers to their survival. The legislative history of the Railway Labor Act and the National Labor Relations Act shows that union officials favored "exclusive representation" in the law. For instance, William Green, then president of the A.F. of L., offered an accurate analogy between exclusive union representation and the adoption of NIRA codes by majority vote in industry cartels.[41] In 1976 officials of the large postal unions denounced H.R. 5023, a bill designed to relieve postal unions of the obligation to represent nonmembers in grievance proceedings.

IV. The Effects of the Norris-LaGuardia and Wagner Acts

Three general results can occur when government intervenes in economic affairs: (1) no substantive impact, (2) perverse or unintended effects, and (3) intended effects. The effects of Norris-LaGuardia and Wagner basically fall into the last class as extremely effective.

A. Directly Visible Effects (Means)

Direct effects of the legislation are easily established. Norris-LaGuardia passed its constitutionality test as a proper legislative restraint on the federal courts.[42] Yellow-dog contracts totally disappeared after 1932, although the NLRB continues to handle unfair labor practice complaints about discrimination in employment because of union activity. By 1941, nineteen states also had passed anti-yellow-dog acts. The antitrust exemption of unionists is well established.[43] With respect to labor injunctions, Norris-LaGuardia succeeded in making it virtually impossible for private plaintiffs to obtain equity relief from federal

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courts in labor disputes, and nearly so in state courts as well.[44] Scattered data show that the number of injunctions granted by the courts to private plaintiffs fell precipitously after Norris-LaGuardia.[45] And by 1941 twenty-four states had their own anti-injunction laws to restrict injunctions in state courts.[46] These courts are not directly bound by Norris-LaGuardia, but an action in state courts, on petition of the party against whom the injunction is sought, may be removed to a federal court which has original jurisdiction and be dismissed there because federal courts lack authority to grant equity relief. The major plaintiff seeking labor injunctions against union actions is now the U. S. government.[47]

The main direct effect of the Wagner Act was to create a regulatory board to enforce the broad mandate of the bill, and there is little doubt about the Board's active existence. In fiscal year 1936, its first year of operation, the NLRB had 140 employees and a budget of $620,000, and it conducted 31 representation elections with 7,734 voters participating. By fiscal 1980 the numbers had grown to 2,900 employees, a budget of $108 million, and supervision of 8,531 elections with 458,114 votes cast. On March 2, 1977, the Board celebrated the thirty millionth vote in NLRB elections. Among regular publications of the Board is *Decisions and Orders of the National Labor Relations Board,* a series occupying fifty feet of shelf space. Volume 1 covers a six-month period from December 7, 1935 to July 1, 1936, while a recent volume, number 256, covers a nine-week period from May 14, 1981 to July 20, 1981. The Board has issued over 400,000 pages of decisions and orders in the published series. The NLRB's *Annual Report* for fiscal 1979 modestly understates the situation: "The uninterrupted growth of the NLRB caseload underscores that the field of labor relations in the United States remains controversial and volatile, an area of national importance and concern, 44 years after the labor relations statute was enacted and the Labor Board was established."[48]

B. Other Effects (Ends)

The purpose of Norris-LaGuardia was to give unionists greater freedom to use their tactics, and Wagner's purpose was to spread the practices of collective bargaining and labor representation. Have they succeeded? The time series evidence is consistent with a positive answer, although other hypotheses might also explain the expansion of unionism and collective bargaining during the 1930's and 1940's. I intend to show that the observed expansion of the labor representation industry can *only* be explained by recourse to these two labor laws. Norris-LaGuardia and Wagner sharply reversed an on-going contraction of the labor representation industry by creating abundant profit opportunities, a reliable way to attract new entrants, innovation, and new competition. Here I am *only* concerned with the pattern of expansion in the employee representation industry, as measured by indexes like the amount of strike activity, number of unions, union customers (membership), union revenues, full-time bureaucracy, and number of contracts. Consideration of the larger economic effects of unionism on the level of national income, labor's share of income, unemployment rates, inflation, working conditions, and other variables is ignored in order to limit the analysis.

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Strikes. The legislation clearly did not accomplish the announced purpose of ushering in an era of "industrial peace," for Norris-LaGuardia allowed unionists more latitude in their aggressive tactics, while Wagner promoted unionism. Statistics on industrial conflict support this interpretation. Between 1922 and 1932 there was an average of 980 work stoppages per year, as shown in Table 1.

TABLE 1

Reported Work Stoppages in the United States, Selected Years, 1922–1981

Year	Work Stoppages
1922	1,112
1923	1,553
1924	1,249
1925	1,301
1926	1,035
1927	707
1928	604
1929	921
1930	637
1931	810
1932	841
1933	1,695
1934	1,856
1935	2,014
1936	2,172
1937	4,740
1938	2,772
1939	2,613
1940	2,508
1941	4,288
1942	2,968
1943	3,752
1944	4,956
1945	4,750
1946	4,985
1950	4,843
1960	3,333
1970	5,716
1977	5,506
1978	4,230
1979	4,827
1980	3,885
1981	2,577

Sources: U.S. Bureau of Labor Statistics, *Handbookof Labor Statistics*, USGPO, 1972; *Analysis of Work Stoppages, 1980*, Bulletin 2120, March 1982; *Monthly Labor Review*, March 1982, p. 5.

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After Norris-LaGuardia passed in 1932, the number of strikes doubled in 1933 to 1,695 and continued to climb to a peak of 4,740 in 1937, the same year the Supreme Court, by a five-to-four vote in April, declared the Wagner Act constitutional (the stitch in time that saved nine), thereby "certifying" the Wagner Act and the NLRB. During the 1970's strikes averaged 5,300 per year, or 20 new strikes each business day, although strikes fell off sharply in the early 1980's.

Number of Unions. Expanding industries attract new firms and innovators, a characteristic of unionism in the 1930's. Table 2 shows the number of unions founded and dissolved by decade, beginning in 1830. These figures are calculated

TABLE 2

Number of National Unions Originated and Dissolved, by Decade, 1830–1979

Decade	Number of Unions Originated	Number of Unions Dissolved, Merged, or Terminated	Net Gain or Loss in Unions
1830–39	2	2	0
1840–49	1	1	0
1850–59	3	0	3
1860–69	12	2	10
1870–79	7	7	0
1880–89	26	3	23
1890–99	40	11	29
1900–09	24	6	18
1910–19	24	6	18
1920–29	9	4	5
1930–39	42	8	34
1940–49	18	10	8
1950–59	11	22	-11
1960–69	7	15	-8
1970–79	5	20	-15

Source: Calculated from Chronology, Appendix 2, in *Labor Unions, The Greenwood Encyclopedia of American Institutions*, ed. Gary M. Fink (Westport, Conn.: Greenwood Press, 1977).

from an encyclopedia of trade unions which contains biographical sketches of over 200 national unions. Although not comprehensive, the volume contains information on every national union of any significance and others as well. The 1930's witnessed 42 new unions, the most prolific decade in U. S. unionism, edging out the 1890's, which had 40 new unions. The net gain during the 1930's was 34 unions since 8 failed or merged, while 11 failed in the 1890's for a net gain of 29 organizations. The 1880's to early 1900's was a period when the formula of business unionism along craft lines finally proved successful, after a series of

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failed experiments in unionism. Unionism was substantial only in coal mining, contract construction, printing, railroads, local transit, and the postal service. At the turn of the century, only a dozen unions claimed more than 10,000 members.

The 1930's also were characterized by innovation in unionism. In 1931 and 1932 the A.F. of L. appeared to be a moribund group of declining organizations. Morale and funds to organize were lacking, and union leaders basically were concerned about preserving their existing holds on crafts. Most of their time and energy involved jurisdictional feuds with other craft unionists. Mass production, blue collar industries were unorganized and appeared unorganizable by feuding craft unions. Another national federation appeared, the Congress of Industrial Organization (C.I.O.), and C.I.O. unions entered the organizing industry to compete with A.F. of L. unions for membership, successfully organizing much of manufacturing. Some of the major unions formed during this period were the United Auto Workers in 1936, United Steel Workers in 1942 (officially), Communications Workers in 1939, and Rubber Workers in 1934.

Membership. The number of union customers fell throughout the 1920's from a reported peak of 5 million in 1920 to fewer than 3 million in 1933. According to NBER figures, membership rose sharply to 7.2 million by 1940, 13.2 million by 1945, and 14.8 million by 1950. Figure 1 shows the path of membership from 1900 to 1951, which captures the periods of union growth in the twentieth century. The boost in membership is apparent during World War I and World War II when government labor boards operated to advance unionization, but the sharp increase in the 1930's also is apparent.[49] The erosion in membership which followed World War I did not occur after World War II.

Figure 2 presents the same membership data as a share of the civilian labor force, and the data follow a similar pattern to Figure 1. Between 1933 and 1945, the fraction of the civilian labor force in unions rose four-fold from 5.7 percent to 22.4 percent. The proportion stayed around 25 percent during the 1950's and then gradually receded to its current 20 percent.

Union Revenues, Staff, and Collective Contracts. There are no published estimates of union revenues during the 1930's, but reasonable estimates can be derived. There is substantial anecdotal evidence that a number of labor unions were close to financial collapse in the early 1930's. The 1933 A.F. of L. convention reported that unemployment among members of its affiliated unions rose from 8 percent in 1929 to 25 percent in 1933, and another 20 percent worked part-time. Bernstein reports that the financial position of the United Mine Worker's union was critical and most of the district organizations went under. The Ladies Garment Workers Union was heavily in debt, only skeleton organizations remained in many trades, and contracts were disappearing. Members' earnings in the Typographical Union dropped from $180 million in 1929 to $123 million in 1933. Share-the-work devices were used, and employed members were taxed as much as 18 to 20 percent of earnings to pay benefits to unemployed members.[50]

Membership dues are the primary source of prosperity for unionists, although they also collect initiation fees, fines, and assessments. The structure of dues

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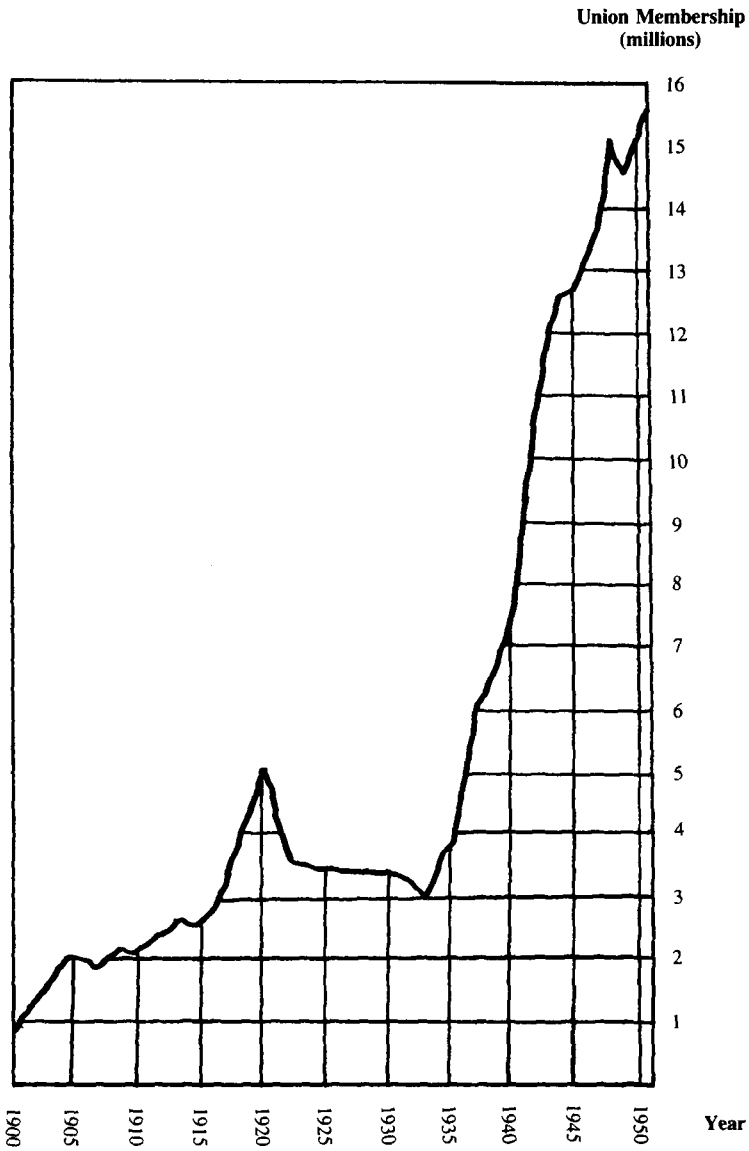
FIGURE 1

Union Membership, 1900–1951, NBER Figures



Figures include Canadian membership. Data source: *Historical Statistics, Colonial Times to 1970*, pp. 176–77.

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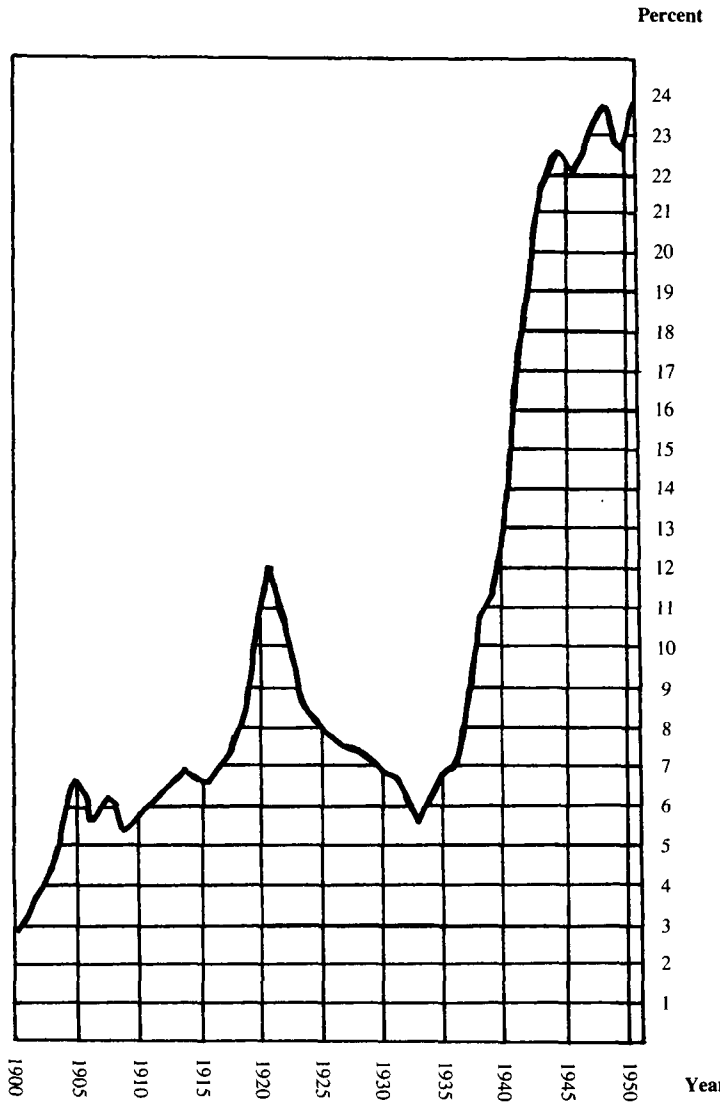
FIGURE 2

Union Membership as a Share of the Civilian Labor Force



NBER figures; figures prior to 1930 include Canadian membership. Data source: *Historical Statistics, Colonial Times to 1970*, pp. 126–27, 176–77.

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varies widely across unions, but one percent of members' earnings is a reasonable estimate of union revenues from dues, that is, between one and two hours of wages per month.[51] Average annual earnings in manufacturing in 1933 were $1,086. Although many union members certainly enjoyed higher hourly wage rates, in view of heavy unemployment and part-time employment, this is probably an approximate average figure for members' annual earnings. With membership of 3 million and a union tax rate of one percent, union revenue from dues was about $32 million in 1933, down from $54 million in 1929. Union membership rose to 7.3 million by 1940 and average annual earnings to $1,432, which would yield $104 million in union dues, more than a three-fold increase in the seven-year period from 1933 to 1940. Union revenues tripled again by 1945, rising to $332 million based on the same calculation, a ten-fold increase in the twelve-year period since 1933.[52]

The number of full-time paid union officers, staff, and organizers probably increased as membership grew in the 1930's and 1940's, but there are no published estimates. According to Peterson, "In general, the paid organizers and enforcement officers comprise the bulk of the unions' staffs. On average, there is probably one full-time paid representative for each 1,000 members."[53] Using this ratio, there were an estimated 3,000 union officials in 1933, 7,300 in 1940, and 13,200 in 1945. The ratio of unionists to members would fluctuate over time and across unions, however. Peterson reported that reduced union funds forced unions to "lay off many of its [sic] organizers" in 1938. She also reported that as members were re-employed, unionists "carried on intensive campaigns to induce former members to resume payment of union dues."[54]

Information about employment in labor unions improved after 1959 because of mandatory reporting under the Landrum-Griffin Act, but there still is no estimate of total employment. Table 3 shows that employment in the national offices of the ten largest unions was 6,800 in 1979. Total membership was over 10 million, or one national staff employee for every 1,600 members. There are 71,000 local unions ranging in size from 5 to 40,000 members, and not all have a full-time union employee, but many do. The Teamsters, for example, reportedly have 7,000 officers and business agents in their 742 locals, far in excess of the 305 employees shown in Table 3 for the national office alone.[55] A reasonable guess for total employment among union staff and officers in the country is between 30,000 and 40,000, or one staff member for approximately every 800 employees represented by unions.[56]

The Wagner Act "had a simple, unified purpose: it was designed to promote collective bargaining."[57] Unfortunately there are no published statistics on the number of collective contracts in the United States during the 1930's and 40's, which would be a direct measure of the effect of the Wagner Act. The spread of collective contracts during the 1930's is, however, not in doubt. The Bureau of Labor Statistics reported in 1938, "In less than five years the picture of employer-employee relations has markedly changed. . . . collective bargaining through trade union agreements has grown to the point where it has now become the

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TABLE 3

Membership and National Staff of Ten Largest Unions, 1979

	Union Membership[a] (thousands)	National Officers and Staff[b]	Union Members per Staff Employee[c]
Teamsters	1,889	305	6,193
NEA	1,600	553	2,893
Auto Workers	1,358	1,579	860
Steel Workers	1,300	1,630	797
Electrical (IBEW)	924	504	1,833
Machinists*	917	936	980
Carpenters	820	263	3,118
State, County, Municipal	750	417	1,799
Retail Clerks	651	380	1,713
Laborers	650	239	2,720
	10,859	6,806	Avg. = 1,595

Sources: a. Bureau of Labor Statistics, *Directory of National Unions and Employee Associations*, 1977, Bulletin 2044 (December 1979).

b. Excludes officers and staff of local unions. Calculated from U.S. Department of Labor, *Labor Organization Annual Reports*, Form LM-2, filed under the Labor-Management Reporting and Disclosure Act of 1959, as amended.

c. Column 2 divided by column 3.

* Staff data, 1976.

accepted procedure in establishing wages, hours, and working conditions in a considerable part of American industry."[58] The BLS described the change as "an expansion in collective bargaining unparalleled in the history of the United States."[59] No complete survey of collective coverage exists, but individual unions claimed new contracts by the score. In 1937, for instance, the Machinists claimed 2,000 new contracts; the Auto Workers claimed all auto manufacturers, except Ford, and 300 auto parts suppliers; the Steel Workers Organizing Committee claimed 431 new contracts; Rubber Workers 100 new contracts; Textile Workers Organizing Committee over 900 new contracts; and the non-operating railroad unions 200 new contracts.[60] By 1976 there were an estimated 200,000 collective contracts.[61]

The number of pages in collective contracts expanded even more rapidly than the number of agreements. As Charles Killingsworth put it, "In one typical relationship, the initial agreement in 1937 was two typewritten pages; the current agreement runs to 186 printed pages plus a separate pension agreement."[62] The

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Labor Relations Reference Manual of 1938 printed nine contracts, which averaged only three pages each.

C. The Ceteris Paribus Clause

The expansion of unionism in the 1930's and 1940's is well-known, but was it caused primarily by Norris-LaGuardia and Wagner legislation or were they only contributing factors? More general theories about the growth of union membership suggest a number of other factors, including the degree of "worker discontent," their stock of grievances, the general climate of public opinion, intellectual revulsion against free markets, the business cycle, composition of Congress, percent of industry already unionized, rates of inflation, unemployment, and so forth.[63] Although these factors may be important as background, precipitating variables, the permanent gains of unionism can only be attributed to Norris-LaGuardia and Wagner, especially the latter.

The Public Sector. The Wagner Act specifically excluded government employees from its coverage, and there was no spurt in unionism in the public sector comparable to that in the private sector during the 1930's and 1940's. However, since 1960 union membership in the public sector has increased from less than 1 million, mostly in postal unions, to more than 6 million. The unionized percentage increased from 11 to nearly 50 percent, a replay of the experience in the private sector during the Depression and World War II.

The explanation is close at hand. President Kennedy signed Executive Order 10988 in January 1962 to promote unionism in the federal bureaucracy. It was based on the National Labor Relations Act but was less generous, because it prohibited both strikes and compulsory union membership (union shop), established no separate oversight agency similar to the NLRB (the Federal Labor Relations Service was established later), required agreements to conform to civil service regulations, and demanded a statement of management rights in every agreement. The state of Wisconsin had earlier (1959) enacted bargaining legislation to cover employees of local governments, but Kennedy's Executive Order triggered a series of bargaining laws in states like Michigan, New York, Washington, and Pennsylvania, where unions traditionally played a large role in the political process. At last count, only a dozen states, mostly in the South and West, did not have some kind of mandatory bargaining law to promote public sector unions. North Carolina is the only state which has specifically prohibited all public sector bargaining by legislation, although the state Supreme Court in Virginia ruled in 1977 that a public employer cannot be forced to bargain with labor representatives without enabling legislation. Other states have prohibited collective bargaining for some segments of the public sector, especially police and fire protection.

Union lobbyists continue to push for more favorable legislation because the laws vary across states and none, including federal, is as favorable toward unionists as the Wagner Act is. The National Education Association and the American Federation of State, County, and Municipal Employees continue to

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pressure Congress for legislation like the Clay bill, which goes beyond the Wagner Act to order every governmental unit in the United States to obey a board, modeled after the NLRB, which would enforce a national bargaining law authorizing a long list of union privileges, including monopoly status for union representatives without secret ballot elections, strikes for public sector employees, and so forth. Constitutionality would be questionable under the general precedent of National League of Cities v. Usery,[64] in which the High Court found that Congress violated the principle of federalism by placing state and municipal government employees under coverage of Fair Labor Standard law. However, the Wagner Act also was widely believed to be unconstitutional until April 1937.

Agriculture. The Wagner Act excluded agriculture from coverage and no burst of unionism occurred. A Southern Tenant Farmers Union formed in July 1934, under the impetus of the Agricultural Adjustment Act, but this labor cartel quickly failed without government machinery to support it. In recent years, however, state boards for labor relations in agriculture were created in California and Arizona, after pressure from Cesar Chavez, his United Farm Workers' Union, and his political allies. There is evidence that the California Board has promoted unionization in agriculture.[65]

Foremen's Union. The short history of the Foreman's Association of America graphically illustrates the importance of NLRB enforcement of unionism. Formed by first-line supervisors at Ford Motor Company in 1941, it quickly grew to a membership of 5,000 and, before its first anniversary, a strike forced Ford to reinstate discharged foremen and sign an agreement. However, in the Maryland Drydock case (1943) the NLRB declared that supervisory personnel were not an appropriate unit for collective bargaining under the NLRA. Ford Motor Company immediately withdrew its recognition of the Foreman's Association. Without certification under NLRA and without the voluntary cooperation of employers in bargaining, the Foreman's Association managed to stay together and stage more than thirty strikes in 1944. Although the National War Labor Board denounced the union and its tactics, it succeeded in gaining some contracts, and Ford signed again in May 1944.

In 1945 the NLRB reversed its previous position in the Packard Motor decision and declared foremen an appropriate bargaining unit. The Foreman's Association grew rapidly to a membership exceeding 28,000, until Taft-Hartley was passed in 1947, and Section 2(3) specifically excluded supervisors from existing bargaining legislation. Employers withdrew recognition from the union, and it disintegrated within a few years.[66]

Plant Guard Workers Union. Automobile plant guards emulated the unionism of automobile workers during the late 1930's. Management put up strong resistance since guards are hired to protect the owners' investment. After considerable indecision, the NLRB, after World War II, ruled favorably on guard locals as an appropriate unit and ordered managements to bargain with them. A series of guard strikes was successful in securing agreements after many unionized production workers honored guard picket lines.

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Most plant guard local unions were organized as branches of industrial unions, essentially the UAW, but under Section 9(B)(3) of the Taft-Hartley Act, it became illegal for protective employees to organize in the same unions as production workers. In February 1948 the CIO set up the Plant Guards Organizing Committee, but the NLRB ruled that the new union was indirectly affiliated with production unions in the CIO. The United Plant Guard Workers of America was quickly formed as an independent union, and successfully struck the Briggs Mfg. Company after UAW workers refused to cross picket lines. Today the UPGWA has a membership of some 20,000.[67]

None of this evidence means that unionism would wholly disappear without regulation on its behalf. However, these cases verify the strong correspondence between labor regulations and the success of unionism as well as the form which it has taken.

Despite all the talk and writing which claims that unionization depends on worker resentment, revulsion against capitalism, the rate of inflation, and other economy-wide influences, the *sine qua non* for permanent union gains in the United States has been government intervention. The differential pattern in collectivizing the labor force across industries in the 1930's and 1940's cannot be explained in any other way.

V. Why the Legislation Passed

Every piece of legislation has its unique history, circumstances, and personalities, and these have been described for the Norris-LaGuardia and Wagner Acts.[68] What has been ignored is an explicit analysis of the beneficiaries of the legislation, including benefits supplied to the academic community.

Individuals invest in legislation if they expect their personal rewards to exceed personal costs.[69] Rewards can be pecuniary and/or nonpecuniary. Legislation passes if promoters can assemble a majority coalition, which, in turn, depends upon the initial strength of the opposition. In the political market for labor regulation in the 1930's, people from four primary groups maneuvered Norris-LaGuardia and Wagner to passage — unionists, politicians-bureaucrats, academics, and an influential minority of businessmen. Active opposition came from the business community, especially the National Association of Manufacturers, and portions of the legal community. The legislation passed in the 1930's rather than in the 1920's because the cost of voting in its favor had been reduced drastically for Congressmen. Opponents from the business community were discredited by the Great Depression, there was widespread sympathy for unions and the unemployed, and the general urge was to "do something." The Democratic Party rolled up large electoral gains in the 1930, 1932, and 1934 elections, and for all practical purposes opposition from the Republican party was eliminated.

There is a long history of intellectual support of unionism, including some from economists, but mostly from non-economists. These prounion opinions generally rested on the notion of the helpless individual and never had been widely

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shared by American popular opinion before the 1930's. As a result, legislation favored by unionists and their academic supporters, such as anti-injunction bills, got nowhere in Congress, state legislatures, and the courts, despite persistent effort through the 1920's. More ambitious peacetime interventions like the Wagner Act were politically unthinkable prior to the onset of the Great Depression and the precedent-setting NRA. Even in the midst of the depression, the Wagner Act faced significant opposition and was widely believed to be unconstitutional, especially after the Court struck down NRA. Some Senators who voted for the Wagner bill apparently wanted to avoid antagonizing the A.F. of L. at the polls and confidently expected the Court to nullify the Wagner Act. Under pressure of FDR's threat to pack the Court, however, the Act was ratified by a five-to-four vote.[70] The special nature of political conditions during the 1930's is highlighted by the swing of the political pendulum against additional legislative benefits for unionism beginning in the late 1930's. Many state legislatures began to adopt restrictive measures to control union actions, Congress passed the Hobbs amendment to include labor violence in the Anti-Racketeering Act, and Congress passed Taft-Hartley over a presidential veto only twelve years after the Wagner Act.

Benefits from Norris-LaGuardia and Wagner for unionists in their self-appointed role as public spokesmen for *all labor* are obvious. Section IV of the present essay documents the huge expansion of their labor representation industry produced by legislation. Organized labor agitated for anti-injunction legislation and exemption from antitrust for half a century. The Democratic Party platform had a plank which denounced labor injunctions and supported restrictions on the courts as early as 1896. Edwin Witte described the political efforts of unionists this way: "The virtual partnership of organized labor with the Democratic party continued through the congressional elections of 1910 and the Presidential elections of 1912 and led to the enactment of the Clayton Act in 1914."[71] Not all Democrats were prounion. In House debate Congressman James Beck, a distinguished free-market Democrat and solicitor-general in the Wilson administration, described impending Congressional acceptance of Norris-LaGuardia as a "young lady who, wearied of the importunate solicitations of a suitor, married him to get rid of him."[72]

Politicians weigh the support to be gained or lost by advancing one cause or another. Politicians who enjoy only marginal support are sensitive to pressure groups like unionists, who are comparatively well-organized with campaign funds, campaign workers, in-kind resources, and members whose votes might be influenced by unionists. These resources can be used for or against candidates. Other politicians are not marginally sensitive to unionists but have discretion to pursue their own ideology on labor affairs or to expand their personal prestige, by promoting particular programs, agencies, new interest groups, budgets, regulations, and interventions. Successful political entrepreneurship involves innovation, the spawning and nourishment of like-minded pressure groups and programs, rather than merely passive response to the votes and money of existing political groups. Although unions seemed to be at their nadir in 1933 as a pressure

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group, it is an understatement to say that their growth potential in votes and money was positive, especially for northern Democrats.

The entrepreneurship of Messrs. LaGuardia and Wagner is easily explained. They hailed from New York City. One-half of reported labor injunction cases in state courts were in New York state during the years 1881–1932. New York always has been the leading state in union membership, and has more union members today than the eleven southern states combined, including Florida and Texas. Fiorello LaGuardia worked as an attorney for labor unions, introduced anti-injunction bills in every session of Congress since 1924, had very close Congressional races as a Republican, and in fact was defeated by 1200 votes in the Roosevelt landslide of 1932.[73] Senator Wagner has been called the "decisive congressional figure in the formulation of labor policy.[74] An eloquent speaker and energetic worker, he was a Tammany Hall loyalist, chairman of the first labor board under NRA, and a strong believer in the purchasing power doctrine of forcing up wage rates to cure the Great Depression. He was narrowly elected to the Senate in 1926 when Republicans split on the wet-dry issue, but was handily re-elected in 1932, 1938, and 1944 by margins of 400,000 votes and more. The Wagner Act, widely believed to be unconstitutional at the time, was a personal triumph for Senator Wagner rather than direct appeasement of well-formulated union demands.

The entrepreneurship of George Norris for unionism is not so easily explained. Nebraska had no substantial union membership, although it should be pointed out that unionists can shift their money and resources across state lines to support or oppose candidates. Norris was a plains states progressive, like Borah and La Follette, who had great latitude to promote his own causes. A *New York Times* editorial of December 1, 1924, claimed that Norris "has a sort of unwritten charter from his State to do what he pleases." Another *Times* editorial, of November 30, 1930, said he carried Nebraska "in his waistcoat for himself." Norris was elected to the House in 1904, appointed to the Senate in 1913, and re-elected until defeated in 1942 as an independent candidate at age 81. The personal glory which Senator Norris realized is indicated by the gaudy subtitles of his biographies, which claim that Norris seized on unionism as a cause after being impressed by the harshness of the workingman's lot during a campaign swing through Pennsylvania.[75]

Governmental labor bureaucrats actively promoted the legislation which subsequently benefited them through formation of larger bureaus, budgets, and interventionist authority. This was particularly true of the NLRB but others also. The U. S. Department of Labor total expenditures were $13.4 million in fiscal 1933 and expanded to $28.7 million in fiscal 1940, a slightly larger percentage expansion than occurred in the total U. S. budget. During the same period the number of Commissioners of Conciliation within the Office of the Secretary of Labor went from 38 to 104 positions. Under Taft-Hartley this group became an independent agency, the Federal Mediation and Conciliation Service, which grew to 347 employees by 1960 and 556 by 1978.

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Few doubt that unionists are the primary clientele of the U. S. Department of Labor and that the size of the Department depends at least partly on the political effectiveness of unionists. The Department of Labor was founded originally in response to union pressure, as were state departments of labor. Frances Perkins, then U. S. Secretary of Labor, was graphic in closing her address to the 1933 A.F. of L. convention when she asked the delegates to regard the Department of Labor as their own department.[76] A related pressure group was the International Association of Governmental Labor Officials (IAGLO). At their twenty-third annual meeting in 1937, President A. L. Fletcher, Commissioner of Labor in North Carolina, asserted that the influence of the IAGLO officials was apparent in the nature of the labor legislation introduced into forty-three state legislatures during the year, "as nearly all the principal bills had been sponsored originally by our organization and painstakingly studied, drafted, and redrafted by our committees."[77]

Individuals important in the passage of the Wagner Act either came from the National Labor Board (which preceded the NLRB), like Senator Wagner himself and Calvert Magruder, general counsel of the Board, or else had backgrounds like that of Donald Richberg, an attorney for the railroad unions, co-draftsman of the Norris-LaGuardia Act, and later general counsel of the National Recovery Act. There was no active bureaucratic opposition to labor legislation in the 1930's, with the exception of Frances Perkins, who supported the Wagner bill but wanted the NLRB within the Department of Labor.

Another major group which pushed labor legislation was the academic community. Although labor and law professors may have been motivated primarily by political beliefs about what was best for the nation, the legislation did nothing to *decrease* their personal power and income, either as individuals or as members of an occupational group. Benefits took the form of direct consumption and increased market demand for their services and included drafting and testifying for legislation, jobs for their students, new industrial relations centers under their direction, new journals, more research funds, and consulting income and influence through litigation, mediation, and arbitration.

Four scholars drafted the Norris-LaGuardia Act in addition to Donald Richberg — Felix Frankfurter and Francis Sayre of the Harvard Law School, Herman Oliphant of Columbia, and Edwin Witte of Wisconsin. The four had contributed a great deal to the voluminous anti-injunction literature over the years.[78] The bill had to be carefully drafted to accomplish its purpose without destroying equity relief in general. In hearings, nearly all academic witnesses testified in favor of the bill, and the same was true with the Wagner bill, although it was drafted by Senator Wagner's office. The American Association for Labor Legislation was organized by Richard Ely (its first president) and other political economists of the American Economic Association (including John R. Commons), as well as prominent business leaders, and was a key pressure group for labor legislation and social security between 1906 and 1945. Closely related at its outset to the National Civic Federation in spirit and practice, the AALL received almost all of its

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financing from a few wealthy backers and a handful of foundations. Among those who served on the council of the AALL at one time or another were Louis Brandeis, Bernard Baruch, Gerard Swope of General Electric, John D. Rockefeller, Elbert Gary of U. S. Steel, Anne Morgan (daughter of J. P. Morgan), Mrs. Madeline Astor, Thomas L. Chadbourne (long-time president of the AALL and leading Wall Street lawyer for the Guggenheim and Morgan interests), and other business leaders who supported a more cartelized and centralized economy.[79]

In 1948 Edwin Witte pointed out that John R. Commons had trained many labor economists of the day as well as many top civil servants concerned with labor problems; that members of the American Economic Association listed labor as their major field more frequently than any other area, including economic theory; and that no courses on campuses were more popular than those in labor.[80] In 1949 N. Arnold Tolles, chairman of the Industrial Relations Research Association committee on teaching, said, "The dominant area of specialization within the social sciences, as taught in American colleges and universities, is now the area of labor problems and industrial relations."[81]

The first industrial relations center was the Labor Relations Section founded at Princeton in 1922. It was followed by some thirty additional centers during the 1930's and 1940's. By 1973 *Roberts' Dictionary of Industrial Relations* listed eighty-one such centers. Highly unionized states like Massachusetts, California, Michigan, New York, and Illinois had between five and eight labor relations centers each, while there were only four in the entire South. The announced purpose of the centers is typified by the statement of the center established at the University of Minnesota in 1945, "These [centers] were designed to cope with the pressing problems of management-labor conflict."

To gain an appreciation for the magnitude of the academic expansion in labor relations, consider the associations that grew with unionism. The Industrial Relations Research Association began in 1948 as an offshoot of the American Economic Association with 1,026 members in its first year of operation, expanded to 1,750 by 1952, and currently claims 5,000 members. Another is the American Arbitration Association, founded in 1926 to promote private settlement of business disputes. It launched an Industrial Arbitration Tribunal in 1937 as "an important first step in the development of labor arbitration and to this day the American Arbitration Association plays a large role in this field."[82] Its panel of labor arbitrators numbered 12,353 persons in 1949 and 26,000 in 1970. One of the ten largest sections of the American Bar Association is its Labor Relations Law Committee, with more than 10,000 members. A small but prestigious group is the National Academy of Arbitrators which was founded in 1947 with a few hundred members and numbered 350 in 1968.[83] The Federal Mediation and Conciliation Service lists 1,200 persons on its roster of arbitrators. There are an unknown number of other groups in the field, including the Association of Labor Relations Agencies (ALRA) founded in 1952, and the Society of Professionals in Dispute Resolution founded in 1973.

The arbitration process alone yields a large amount of income to academics in

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labor relations, in addition to that from their other services as labor experts. In the 1930's an estimated 8 to 10 percent of collective agreements provided for arbitration as the final step in the grievance procedure, but by 1941 the U.S. Conciliation Service found such clauses in 62 percent of the 1,200 contracts in its files. Currently a standard figure is 96 percent.[84]

A questionnaire in mid-1974 to members of the National Academy of Arbitrators showed that 47.6 percent of respondents were affiliated with universities. The next largest group was practicing lawyers, at 19.5 percent.[85] Other inventories of arbitrators confirm the preponderance of law, economics, industrial relations, personnel, and business professors, and university officials.[86] A survey by the Federal Mediation and Conciliation Service in 1978 showed that arbitrators charged an average of 3.09 days per case at $239 per diem total fees.[87] No one knows how many arbitration cases are decided in labor disputes each year. One published estimate is at least 20,000 cases in 1960.[88] The American Arbitration Association reported that a record of 8,655 labor disputes went to arbitration in the first six months of 1980.[89] These estimates are undoubtedly low because there are an estimated 200,000 collective agreements in the country. If there were one arbitration case per contract per year, there would be $143 million in income each year for arbitrators at 3 days per case and $239 per day. Surveys of the National Academy of Arbitration showed that its members averaged 36 arbitration cases in 1952 and 51 in 1969, the latter amounting to 17,500 cases for this small group alone. Two-thirds of members reported waiting lists.[90]

An arbitrator must maintain his acceptability to unionists and managers in order to sustain this source of income; otherwise the parties can settle their differences directly, saving the expense of arbitration, or choose other arbitrators. The situation is analogous to a court system in which each judge derives his income directly from the disputants and who must take their reactions into account in his decisions. Raffaels claims that concepts like "past practice" and "common law of the shop" were introduced so that arbitrators could decide more grievances for unionists.[91] Many employers now have a form of arbitration which they probably never expected to buy. Although arbitrators deny that they are concerned about rendering at least 50 percent of their decisions in favor of union grievances, it is well-known that commercial organizations issue ratings on arbitrators and prospective arbitrators, basically in terms "pro" or "anti" union. These incentives also help to explain the bland nature of the academic literature in industrial relations, where no one is known as "antiunion."

As a point of clarification I should note that my contention is *not* that arbitrators were the crucial interest group behind the Wagner Act who subsequently benefited by institutionalization of the labor conflict system. Arbitrators simply were too few in number and the lag in expansion of the arbitration system too long and uncertain to make this a viable interpretation. My point is similar to that of the Friedmans:

> An individual who intends only to serve the public interest by fostering

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> government intervention is "led by an invisible hand to promote" private interests, "which was no part of his intention."[92]

Academics did serve as arbitrators and dispute mediators prior to the Wagner Act, and their advocacy of such procedures, perhaps without private financial gain as a motive, fostered a large expansion in the demand for their skills, most of which was eventually supplied by new people. Even if the original proponents of the Wagner Act did not personally profit from the growth spawned by the legislation, their ideological and occupational successors did.

The last group which paved the way for the labor legislation of the 1930's was an important sector of the business community. Although the Wagner Act is often viewed as a complete victory over the business community, this is not quite true because the business community was neither united nor determined in its opposition to unionizing legislation. The lines of influence are impossible to trace precisely. Perhaps the most important figure among those pushing for cartelism was Gerard Swope of General Electric, but he was joined by many others. Many were gathered in the Business Advisory Council of the Commerce Department, including W. Averill Harriman, Thomas W. Lamont of J. P. Morgan & Co., Sidney Weinberg of Goldman, Sachs, Louis E. Kirstein of Filene's and Federated Department Stores, Walter J. Teagle of Standard Oil of New Jersey. In addition there were many others associated with the National Civic Federation and the American Association for Labor Legislation. J. P. Morgan's lawyer, Francis Lynde Stetson captured the general belief among this segment of the business community: "The discontent of the masses . . . 'is to be allayed not by a policy of stern and unbending toryism, but by flexibility.' "[93] Probably a strong majority of the business community, prominently represented by the National Association of Manufacturers, was adamantly opposed to prounion legislation, yet an increasing number of corporate leaders grew to accept government interference in economic life as a means to solve problems during this century. The precise role of the business community in the passage of the Wagner Act deserves considerably more research, but the general thesis of George Stigler could well serve as a guide:

> the larger part of the regulations that businessmen are subjected to must be of their own contriving and acceptance. . . . Most regulatory policies have been sought by producer groups, of whom the business community is the most important and the academic community by no means the least important.[94]

VI. Conclusion

The huge expansion of unionism in the 1930's traditionally has been interpreted as a function of worker discontent, public sympathy for unionism, revulsion against free markets, and, secondarily, enlightened labor legislation. The confusion and despair of the Great Depression dramatically altered prevailing political constraints, and specific individuals with specific ideas seized the resulting political opportunities. This paper argues against the conventional academic assertion that

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Norris-LaGuardia and the Wagner Act were government intervention to correct previous market failures, and shows that the sharp increase in the size of the labor representation industry was due to monopoly-producing regulatory legislation. These developments were the result of good intentions, in part, but received major assists from self-interest. Identifiable beneficiaries of the legislation, namely, unionists, politicians, labor bureaucrats, their academic allies, and a minority of businessmen, were largely the same individuals (or their occupational successors) as its supporters. While this observation is consistent with economic theory, it is widely ignored in the literature about the period. Discussion of labor legislation is particularly cluttered with public interest rhetoric. And in view of the available evidence, it is difficult to see why the process of labor legislation should be modeled otherwise than the normal case of intervention on behalf of an industry.

These conclusions do not exclude the possibility that participants in the legislative and regulatory process were well-intentioned. Frequently they were. Some activists had deep convictions. Participants probably had the usual admixture of idealism and narrow self interest. Nor does it mean that political activists had perfect foresight about their prospective gains, any more than market participants do. Nor was there a conspiracy. Legislation always is produced by a relatively small number of people pursuing their own interests. But the mythology of labor legislation apparently is immovable. Taylor and Witney in their textbook, for example, say: "Supporters of the legislation [the Wagner Act] recognized that the modern industrial environment rendered obsolete the concept of individual bargaining as the regulator of industrial relations. Unchecked economic power lodged in a comparatively few corporate giants could lead to some form of despotism. . . . Social legislation was blocked by a Supreme Court which ignored the most obvious facts of economic life."[95]

Today a substantial number of people earn their livelihoods directly from conflicts generated year after year in our system of labor representation. Unionists collect over $5 billion in dues and fees each year, full-time union officials number more than 30,000 and are paid in excess of $1.2 billion, there are over 10,000 members of the American Bar Association's Labor Relations Section, more than 5,000 members of the Industrial Relations Research Association, more than 20,000 persons on the labor roster of the American Arbitration Association, almost 3,000 employees of the National Labor Relations Board, and so forth. The redistributive effects of unions exceed $30 billion each year.[96] Politicians seeking re-election are subject to the influence of unions, the largest organized political group in terms of both manpower and money. Each bureaucracy seeks to retain and expand its functions. The Federal Mediation and Conciliation Service for instance, whose mandate is to "proffer its services in any labor dispute in any industry affecting commerce . . . whenever in its judgment such dispute threatens to cause a substantial interruption in commerce," has a caseload which includes a retail bakery of six employees and a tile company of eight employees.

European unions never had to spend much effort to organize workers, for they were able to rely instead on class identity for allegiance. Until the 1930's,

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American unionists had to organize and use aggressive tactics to establish their organizations because of the diverse opinions of workingmen and employers, and the ultimate willingness of the courts to enforce the law against private coercion. In the 1930's, however, unionists gained more-or-less permanent footholds in the economy based on legislation on their behalf. And the accompanying mediators, conciliators, fact-finders, arbitrators, and "crisis-solving" techniques of the labor representation industry grew in stature and income along with them.

NOTES

1. F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), p. 267.
2. See, for instance, James A. Gross, *The Reshaping of the National Labor Relations Board* (Albany, N.Y.: State University of New York Press, 1981), and the book review by Morgan Reynolds in *Journal of Economic History* 42 (December 1982): 966–68.
3. W. H. Hutt, *The Strike-Threat System* (New Rochelle, N.Y.: Arlington House, 1973), p. 23.
4. William E. Leuchtenburg, "The New Deal and the Analogue of War," in *Change and Continuity in Twentieth Century America*, ed. John Braeman, Robert H. Bremmer, and Everett Walters (Columbus: Ohio State University Press, 1964), p. 87.
5. The friendship formed between Roosevelt and Frankfurter produced an extraordinary correspondence. Frankfurter's memo to FDR on June 8, 1941, states his version of the common view of labor writers about labor markets: "The day of industrial absolutism is done. All our experience since the industrial revolution demonstrates that employers as a class cannot be relied upon, voluntarily and out of the goodness of their hearts, to give a square deal to unorganized labor; this has been precluded by the pressure of immediate self-interest and the inexorable workings of the competitive system" (Max Freedman, ed., *Roosevelt and Frankfurter: Their Correspondence, 1928–45* [Boston: Atlantic, Little Brown, 1967], p. 604).
6. Leuchtenburg, "The New Deal," pp. 87–90.
7. *Ibid.*, p. 88.
8. See Morgan Reynolds, "Understanding Political Pricing of Labor Services: The Davis-Bacon Act," *Journal of Labor Research* 3 (Summer 1982): 295–309.
9. Section 7(a) was originally interpreted as meaning "proportional" collective bargaining; that is, if a particular union received 55 percent of the votes, it only represented those 55 percent, and so forth, rather than the compulsory majority rule of today. Edwin E. Witte noted that the essential provisions of 7(a) were "but restatements of principles first recognized by the National War Labor Board" ("The Background of the Labor Provisions of the N.I.R.A.," *University of Chicago Law Review* 1 [1934]: 573). For a portrayal of the transition to majority rule, see Kim McQuaid, *Big Business and Presidential Power* (New York: William Morrow, 1982), chap. 1, pp. 39–47. Thanks to Murray Rothbard for this point.
10. Many scholars also argue that the NLRA was a prerequisite to the growth of Big Labor and, ultimately, to the development of the alliance between organized labor and the Democratic Party. See Daniel A. Sipe, "A Moment of the State: The Enactment of the National Labor Relations Act, 1935," (Ph.D. diss., University of Pennsylvania, 1981).
11. Section 2 of the Anti-Injunction Act is noteworthy for its colorful declaration of public policy, borrowed from two sources: Chief Justice Taft's opinion in the American Steel Foundries case and the language of the Railway Labor Act. The public policy statement of the Norris-LaGuardia also served as the forerunner of the policy statement in the Wagner Act. By the turn of the century it was commonplace to write about "the individual unorganized worker who is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor" (Norris-LaGuardia Act, Section 2). "A single employee was helpless in dealing with an employer . . . unable to leave the employ and to resist arbitrary and unfair treatment. . . . Union was essential to give laborers an opportunity to deal on an equality with their employer" (American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184 [1921]).
12. Benjamin Aaron, "The Labor Injunction Reappraised," *UCLA Law Review*, vol. 10:292 (1963), p. 295.

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13. For example, see Charles O. Gregory and Harold A. Katz, *Labor and the Law*, 3rd ed. (New York: W. W. Norton & Company, 1979), pp. 174–84; Edwin F. Beal, Edward D. Wickersham, and Philip K. Kienast, *The Practice of Collective Bargaining*, 5th ed. (Homewood, Ill.: R. D. Irwin, 1976), pp. 137–38; Juanita M. Kreps, *et al.*, *Contemporary Labor Economics and Labor Relations*, 2nd ed. (Belmont, Calif.: Wadsworth, 1980), p. 149; Aaron, "The Labor Injunction"; and Lloyd G. Reynolds, *Labor Economics and Labor Relations*, 8th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1982), pp. 506–507.
14. Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917). For evidence of similarity in union-nonunion pay, see Albert F. Hinrichs, *The United Mineworkers of America and the Non-Union Coal Fields* (New York: Columbia University, 1923). Also see the evidence from multiple sources that annual wages were twenty percent higher, or more, for unorganized miners than for unionized miners, in Hitchman Coal & Coke Co. v. Mitchell et al., 202 F. 512, 540–42 (1912). For evidence of contemporary superiority of nonunion wages in coal mining, see "Maverick Mine," *Wall Street Journal*, October 23, 1978, p. 1; and "Digging for Dollars," *Wall Street Journal*, November 10, 1978, p. 1.
15. The Federal District Court described the events which had angered the Hitchman employees as follows: "The men did not want to quit work, and tried to get permission from their union officials to continue loading engine coal, for the reason that, if they were not allowed to do so, the Baltimore & Ohio Railroad Company would haul in nonunion coal and have it loaded into their engines from plaintiff's tipple and bins under the terms of plaintiff's contract with the railroad company. . . . The strike was called, coal was hauled from an Ohio union mine with which settlement had been made by the union by the railroad, and loaded on its engines over plaintiff's tipple. . . . This national strike was finally settled in July, 1906, by the adoption of the 1903 [pay] scale, which plaintiff from the start had offered to pay. But in the meantime the Hitchman miners had been promised benefits by the union which were not paid, and they were incensed because the Ohio coal had been allowed to be hauled and loaded on its engines by the railroad over plaintiff's tipple, and because plaintiff *Hitchman's* original proposition to pay the 1903 scale had not been accepted" (Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 [1917].) For an extensive treatment of a similar incident, see Sylvester Petro, *The Kingsport Strike* (New Rochelle, N.Y.: Arlington House, 1967).
16. Alvin F. Goldman, *The Supreme Court and Labor-Management Relations Law* (Lexington, Mass.: Lexington Books, D. C. Heath, 1976), pp. 18–19; and Felix Frankfurter and Nathan Greene, *The Labor Injunction* (New York: Macmillan, 1930), pp. 148–49.
17. "Unionizing Employees under Contract Declared Illegal by United States Supreme Court," *Monthly Labor Review* 6 (January 1918): 146–47.
18. *Ibid.*, p. 149.
19. A number of writers classify today's union security provisions compelling union membership and/or dues payment as a condition of continuing employment in the same category as nonunion oaths. For example, Hayek says: "unions should not be permitted to keep non-members out of any employment. This means that closed- and union-shop contracts (including such varieties as the 'maintenance of membership' and 'preferential hiring' clauses) must be treated as contracts in restraint of trade and denied the protection of the law. They differ in no respect from the 'yellow-dog contract' which prohibits the individual worker from joining a union and which is commonly prohibited by the law" (*Constitution of Liberty*, p. 278). Strictly speaking, a yellow-dog contract demands nonunion status only as a condition of continuing in the *same* employment relationship. If nonunion oaths generally were considered as a disadvantage in working conditions *and* labor markets were competitive, employers would have to pay higher wages in order to compensate workers for insisting on such a disadvantage.

    Right-to-work laws are directly related to this issue because they prohibit collective agreements requiring union membership or payment of union dues as a condition of employment. Friedman appears to differ from Hayek in his policy recommendation because Friedman opposes right-to-work laws on the grounds that such laws restrict liberty of contract, that is, the freedom of private parties to agree to union security clauses if they wish. (See Milton Friedman, *Capitalism and Freedom* [Chicago: University of Chicago Press, 1962], pp. 115–17.) Legal versions of the argument are: Adair v. U.S., 208 U.S. 161 (1908) and Coppage v. Kansas, 236 U.S. 1 (1915), in which the Supreme Court invalidated federal and state legislation prohibiting nonunion oaths because the legislation denied freedom of contract.

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Thomas Haggard makes a libertarian argument *for* right-to-work laws on somewhat different grounds than Hayek, namely, that collective bargaining agreements are not true contracts in which enforceable promises of something of value are voluntarily exchanged between parties ("Right-to-Work: What Is It? Who Has It?" *Reason*, May 1979, pp. 34–37). According to this view, right-to-work laws properly prevent the state from enforcing unilateral employer promises obtained by coercive methods for which nothing is exchanged in return. Of course, this approach raises the more general question of what provisions, if any, in collective contracts would be enforceable by law. Also see Haggard's *Compulsory Unionism, the NLRB, and the Courts* (Philadelphia: University of Pennsylvania, The Wharton School, 1977).

My view is that as long as there is a reasonably competitive, open market with many employers and potential entrants, they should be free to offer any terms of employment they wish. Similarly, employees should be free to offer (demand) any terms they wish. Employers might require donations to a pension plan, a labor union, the Communist party, a signature on a nonunion oath, and none would interfere with or restrain the freedom of individuals to trade in the labor market. To legally constrain employers from offering particular packages of compensation to employees interferes with freedom. See Morgan Reynolds, "The Free Rider Argument for Compulsory Union Dues," *Journal of Labor Research* 1 (Fall 1980): 295–313.

20. Roscoe Pound, "Legal Immunities of Labor Unions," *Labor Unions and Public Policy* (Washington, D.C.: American Enterprise Association, 1958); reprinted in Reprint No. 1, *Journal of Labor Research*, Fall 1979.
21. Apex Hosiery v. Leader, 310 U.S. 469 (1940); U.S. v. Hutcheson, 312 U.S. 219 (1941); and Hunt v. Crumboch, 325 U.S. 821 (1945).
22. Sylvester Petro, "Injunctions and Labor Disputes: 1880–1932," *Wake Forest Law Review* 14 (June 1978): 341–576; reprinted as Baylor Institute for Labor Policy Research, Reprint No. 1.
23. Archibald Cox and Derek Bok, *Cases and Materials on Labor Law*, 7th ed. (New York: The Foundation Press, 1969), p. 71.
24. Goldman, *The Supreme Court*, p. 7.
25. On June 29, 1886, Congress enacted a law legalizing the incorporation of national trade unions, with "the right to sue and be sued, to implead and be impleaded." The act was passed with the support of organized labor, which believed that it would enhance respectability and end the doctrine of criminal conspiracy which still surrounded unionism. A statement at the A. F. of L. convention in 1886 declared, "The law is not what was desired . . . but it recognizes the principle of the lawful character of trades unions, a principle we have been contending for years." No union made an effort to secure a charter under the law and by 1901 Sam Gompers said at the A. F. of L. convention: "Some years ago the Federal Congress passed a law for the incorporation of our trade unions. Beyond question the advocates of that bill really believed they were doing the organized workers a real service; but at the time, and since, we have repeatedly warned our fellow-unionists to refrain from seeking the so-called protection of that law."

This was the opening round of a concerted effort against incorporation, prompted by the Taff-Vale case in England. In this case, a railroad had sued unionists for damages of $150,000 which it claimed to have suffered during a strike. The House of Lords held that a *registered* trade union was subject to civil suits for damages, was collectively responsible for the acts of its officers as individuals, and its funds could be attached to satisfy claims. The decision was instrumental in producing the 1906 Trades Disputes Act, which provided complete immunity from torts and ordinary contract law for unionists. It was a vote-catching expediency by men in the Liberal Party, who nevertheless failed to forestall the formation of the Labor Party and the gradual demise of their own party.

In America a political movement sprang up to make incorporation of trade unions mandatory. In April 1903, for instance, a member of the National Civic Federation said: "When the suggestion is made to the average labor leader that such incorporation ought to be enforced, we at once meet with the answer that it would be fatal to their methods, which is an open confession that their methods are illegal and wrong." The episode ended when Senator Sheppard of Texas submitted a bill, which later became Public Act 306, to repeal the incorporation act of 1886, and it passed both Houses without discussion on July 22, 1932. (See "Historical Review of Trade-Union Incorporation," *Monthly Labor Review*, January 1935, pp. 38–43, the source for quotations used in this note.)

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26. Edwin E. Witte, *The Government in Labor Disputes* (New York: McGraw-Hill, 1932), p. 84; reprinted by Arno, 1969. Frankfurter and Greene report the earliest injunction in "the early 1880's" (*The Labor Injunction*, p. 21). James M. Landis and M. Manoff say that American Labor injunctions "date back to the Railway strike of 1877," when Judge Drummond, Circuit Judge for the Seventh Circuit, found strikers guilty of contempt for interfering with the general orders of the court directing the receivers of the railroads to operate their trains (*Cases on Labor Law*, 2nd ed. [Chicago: The Foundation Press, 1942], pp. 39–40 [citations omitted]).
27. Irving Bernstein, *The Lean Years: A History of the American Workers, 1920–1933* (Boston: Houghton Mifflin, 1960), p. 400.
28. Petro, "Injunctions and Labor Disputes," fn. 22.
29. Union Pac. Ry. v. Reuf, 120 F. 102, 120–21 (C.C.C. Neb., 1902), cited by Petro, "Injunctions and Labor Disputes," p. 373. Literature on union violence includes: Graham Adams, *Age of Industrial Violence: 1910–1915* (New York: Columbia University Press, 1966); Hugh D. Graham and Ted R. Gurr, *Violence in America*, rev. ed. (Beverly Hills, Calif.: Sage Publications, 1979); as well as several articles by Charles Stevenson: "The Tyranny of Terrorism in the Building Trades," *Reader's Digest*, June 1973, pp. 89–94; "The Construction Unions Declare War," *Reader's Digest*, July 1973, pp. 79–83; "Labor Violence — A National Scandal," *Reader's Digest*, August 1973, pp. 153–58; and "Yes, Construction Terrorism Is Real," *Reader's Digest*, December 1973, pp. 85–89. Periodicals frequently report incidents of violence and vandalism in labor disputes. For instance: an AP wirephoto in the *Houston Chronicle* (July 22, 1982, p. 1) shows strikers pelting a car with bricks and rocks at the Iowa Beef Processing plant at Dakota City, Nebraska; *Time* (September 28, 1981, p. 16) shows union miners demolishing a fence at Kerr-McGee's nonunion mine in Galatia, Illinois; and a government informant alleged that the Hotel Employees' and Restaurant Employees' Union paid him to bomb two Tahoe, Nevada, casinos during labor disputes (*Wall Street Journal*, September 29, 1982, p. 50). Also see Randolph Boehm, *Organized Crime and Organized Labor* (Washington, D.C.: Foundation for the Advancement of the Public Trust, 1975), and the newly published *Union Violence: The Record and the Response by Courts, Legislatures, and the NLRB*, by Armand J. Thieblot, Jr. and Thomas R. Haggard (Philadelphia, Pa.: Industrial Research Unit, Wharton School, University of Pennsylvania, 1983), for more on this neglected topic.
30. Of 524 reported cases of labor injunction in federal and state courts from 1880 to 1932, unions sought to enjoin employers' actions in 33 and gained a partial injunction in only one case. By comparison, unions sought to enjoin tactics by other *unionists* in 26 cases, nearly as many as they sought to enjoin employers. (Petro, "Injunctions and Labor Disputes," p. 388 and Appendix I.)
31. Henry George, "The Condition of Labor: An Open Letter to Pope Leo XIII," *The Land Question* (1891; New York: Robert Schalkenbach Foundation, 1982), p. 77.
32. U. S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970*, pt. 1, p. 1710.
33. Witte, *The Government in Labor Disputes*, p. 84.
34. *Monthly Labor Review* 102 (September 1979): 59.
35. IBEW v. Fouts, US 60 L Ed 2d 698 (1979).
36. See John E. Abodeely, *The NLRB and the Appropriate Bargaining Unit* (Philadelphia: University of Pennsylvania Press, 1971); Robert E. Williams, Peter A. Janus, Kenneth C. Huhn, *NLRB Regulation of Election Conduct* (Philadelphia: University of Pennsylvania Press, 1974); A. R. McFarland and W. S. Bishop, *Union Authorization Cards and the NLRB* (Philadelphia: University of Pennsylvania Press, 1969); and W. N. Coke and F. H. Gantschi III, "Political Bias in NLRB Unfair Labor Practice Decisions," *Industrial and Labor Relations Review* 35 (July 1982): 539–49.
37. President Roosevelt named George N. Peek to head the new Agricultural Adjustment Administration in 1933, "a hard bitten farm-belt agitator who had served as 'a sort of generalissimo of industry' under the War Industries Board." (See Leuchtenburg, "The New Deal," pp. 112–13, fn. 3.)
38. John E. Kwoka, "Pricing under Federal Milk Market Regulation," *Economic Inquiry* 15 (July 1977): 357–84.
39. Ford Motor v. NLRB, US 60 L Ed 2d 420 (1979). The quote was taken from the *Monthly Labor Review* 102 (September 1979): 58.
40. A few exceptions occur in sports, entertainment, and higher education, in which some collective

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contracts specify only wage floors, above which individuals can negotiate (the so-called "star system"). Thanks to Dan Heldman for this point.

41. NLRB, *Legislative History of the National Labor Relations Act* (Washington, D.C.: U.S. Government Printing Office, 1949), vol. 1, pp. 1531, 1570–71, 1574–76.
42. The cases are: Senn v. Tile Layers' Protective Union, 301 U.S. 468 (1937); Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938); New Negro Alliance v. Sanitary Grocery Co., Inc., 303 U.S. 552 (1938); and Milk Wagon Drivers' Union v. Lake Valley Farm Products, 311 U.S. 91 (1940).
43. Litigation continues to test the outer limits of the exemption. Some labor organizations fail to qualify for the labor union exemption because members do not have an "employment relationship" with an enterprise, e.g., truckers, painters, or fishermen who attempt to fix product prices rather than hourly wage rates. In Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975), the Supreme Court by a five-to-four vote found the union in violation of the Sherman Act after its picket forced a general contractor, Connell, to subcontract mechanical work to firms with bargaining agreements with the union.
44. An important exception is the Supreme Court's opinion in Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970) that federal district courts can enjoin strikes which violate the no-strike clause in a union contract when the contract provides for binding arbitration of the dispute over which the strike was called.
45. See Benjamin Aaron, "Labor Injunctions in the State Courts," *Virginia Law Review* 50 (November 1964): 1147–64; John R. Commons and John B. Andrews, *Principles of Labor Legislation*, 4th rev. ed. (1936; reprinted by Augustus M. Kelly, 1967), pp. 415–17.
46. The similarity between labor and agricultural cartels is highlighted by Wisconsin, which enacted a union anti-injunction act in 1929. Bernstein says the act was maneuvered through the legislature by adding a provision that contracts obligating farmers not to join cooperative associations — another kind of yellow-dog contract — would be unenforceable (*The Lean Years*, p. 395). For more on state labor law, see: Charles C. Killingsworth, *State Labor Relations Acts* (Chicago: University of Chicago Press, 1952); and Sanford Cohen, *State Labor Legislation, 1937–1947* (Columbus: Ohio State University, 1948).
47. See, for instance, John E. Abodeely, "Injunctive Powers under the National Labor Relations Act," in *Collective Bargaining: Survival in the 70's?* ed. Richard L. Rowan (Philadelphia: Wharton School, University of Pennsylvania Press, 1972), pp. 106–26.
48. NLRB, *Annual Report* (1979), p. 1.
49. The executive council of the A. F. of L. in its report at the 1937 convention declared that as a consequence of the "impetus to growth, which followed directly upon the decision of the United States Supreme Court upholding the constitutionality of the Wagner Labor Relations Act, the A. F. of L. and its constituent national and international unions had gained nearly a million members" (*Monthly Labor Review*, December 1937, p. 1427).
50. Bernstein, *The Lean Years*, pp. 15–17; and Philip D. Bradley, "Involuntary Participation in Unionism," in Reprint No. 1, *Journal of Labor Research*, Fall 1979, pp. 28–32.
51. Charles W. Hickman, "Labor Organizations' Fees and Dues," *Monthly Labor Review* 100 (May 1977): 19–24; Florence Peterson, *Handbook of Labor Unions* (Washington, D.C.: American Council on Public Affairs, 1944); and Florence Peterson, *American Labor Unions* (New York: Harper & Brothers, 1945 and 1952).
52. Florence Peterson, then Director of Industrial Relations in the Bureau of Labor Statistics, wrote in 1945 that "the total amount of money which passes in and out of all union treasuries currently amounts to several hundred million dollars a year (*American Labor Unions*, p. 113), probably a substantial underestimate. J. B. S. Hardman calculated total income for unions at $400 million per year during the late 1940's. He also cited a $400 million figure published in *Life* magazine in 1948 and official estimates of $390 million in 1943 and $478 million in 1946 published by the Bureau of Internal Revenue. (Hardman, " 'Dollar Worth' of the Unions," in J. B. S. Hardman and Maurice F. Neufeld, eds., *The House of Labor* [New York: Prentice-Hall, 1951], p. 411.) Also see Philip Taft, "Dues and Initiation Fees in Labor Unions," *Quarterly Journal of Economics* 60 (February 1946): 219–41.
53. Peterson, *Handbook of Labor Unions*, p. 104.
54. Florence Peterson, "Industrial Relations in 1938," *Monthly Labor Review*, March 1939, p. 493.
55. Steven Brill, *The Teamsters* (New York: Harper & Row, 1978), p. 13.

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56. National unions and employee associations numbered 210 in 1976 and their collective bargaining coverage was estimated at 26.8 million members and nonmembers, in Bureau of Labor Statistics, *Directory of National Unions and Employee Associations*, 1977, Bulletin 2044, December 1979, pp. 58, 78.
57. *Guidebook to Labor Relations, 1980,* 19th ed. (Chicago: Commerce Clearing House, 1979), p. 9.
58. *Labor Relations Reference Manual*, vol. 1-A (Washington, D.C.: Bureau of National Affairs, Inc., 1938), pp. 818–38.
59. *Ibid.*, p. 780.
60. *Ibid.*, p. 780–81.
61. Bureau of Labor Statistics, *Directory of National Unions and Employee Associations*, 1977, Bulletin 2044, December 1979.
62. Charles C. Killingsworth, "Arbitration Then and Now," *Labor Arbitration at the Quarter-Century Mark* (Washington, D.C.: Bureau of National Affairs, 1973), pp. 21–22.
63. Orley Ashenfelter and John H. Pencavel, "American Trade Union Growth: 1900–1960," *Quarterly Journal of Economics* 83 (August 1969): 434–48.
64. National League of Cities v. Usery, 97 S. Ct. 2465 (1976).
65. Rex Cottle, Hugh Macaulay, and Bruce Yandle, *Labor and Property Rights in California Agriculture* (College Station, Tex.: Texas A & M University Press, 1982); Patty Newman, "Who's Bankrolling the UFW?" *Reason*, November 1979, pp. 18–29; and Erik Larson, "Internal Strains Split UFW," *Wall Street Journal*, May 17, 1982, p. 33.
66. J. Carl Cabe, *Foremen's Unions: A New Development in Industrial Relations* (Urbana: University of Illinois Press, 1947); and Charles P. Larrowe, "A Meteor on the Industrial Relations Horizon: The Foreman's Association of America," *Labor History* 2 (Fall 1961): 259–94.
67. Gary M. Fink, ed., *Labor Unions* (Westport, Conn.: Greenwood Press, 1977), pp. 283–85.
68. See Witte, *The Government in Labor Disputes*, pp. 66, 265–84; Bernstein, *The Lean Years*, chap. 11; Paul F. Brissenden, "Campaign Against the Labor Injunction," *American Economic Review* 23 (March 1933): 42–54; Robert F. Koretz, ed., *Statutory History of the United States: Labor Organizations* (New York: Chelsea House Publishers, 1970); Arthur M. Schlesinger, Jr., *The Coming of the New Deal* (Boston: Houghton Mifflin, 1958), chaps. 23–25; James A. Gross, *The Making of the National Labor Relations Board* (Albany, N.Y.: State University of New York Press, 1974); Richard C. Cortner, *The Wagner Act Cases* (Knoxville: University of Tennessee Press, 1964); Philip Ross, *The Government as a Source of Union Power* (Providence, R.I.: Brown University Press, 1963); Irving Bernstein, *The New Deal Collective Bargaining Policy* (Berkeley: University of California Press, 1950); and the references in Gross, *The Reshaping*, p. 268.
69. George Stigler ("The Economic Theory of Regulation," *Bell Journal of Economics and Management Science* 2 [Spring 1971]: 3–21) and Sam Peltzman ("Toward a Theory of Government Regulation," *Journal of Law and Economics* 19 [August 1976]: 211–40) develop the interest-group explanation of politics; Joseph Reid ("Understanding Political Events in the New Economic History," *Journal of Economic History* 37 [June 1977]: 302–28) supports the argument that politicians can and do pursue their own ideology; and James B. Kau and Paul H. Rubin ("The Impact of Labor Unions on the Passage of Economic Legislation," *Journal of Labor Research* 2 [Spring 1981]: 133–45; and "Self Interest, Ideology, and Logrolling in Congressional Voting," *Journal of Law and Economics* 22 [October 1979]: 365–84) provide empirical analysis of the politics of labor unions.
70. NLRB v. Jones and Laughlin Steel, 301 U.S. 1 (1937).
71. Witte, *The Government in Labor Disputes*, p. 266.
72. Koretz, *Statutory History*, pp. 240–41.
73. See William Manners, *Patience and Fortitude: A Biography of Fiorello LaGuardia* (New York: Harcourt, Brace, Jovanovich, 1976); Fiorello H. LaGuardia, *The Making of an Insurgent: An Autobiography* (New York: Capricorn Books, 1961); Arthur Mann, *LaGuardia, A Fighter Against His Times, 1882–1933* (Chicago: University of Chicago Press, 1969); Howard Zinn, *LaGuardia in Congress* (Ithaca, N.Y.: Cornell University Press, 1959); and *Guide to U.S. Elections* (Washington, D.C.: Congressional Quarterly, 1975).
74. Bernstein, *The Lean Years*, p. 262.
75. See Norman L. Zucker, *George W. Norris, Gentle Knight of American Democracy* (Urbana: University of Illinois Press, 1966); Richard L. Newberger and Stephen B. Kahn, *Integrity: The*

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76. *Monthly Labor Review*, November 1933, p. 1121.
77. *Monthly Labor Review*, October 1937, p. 875.
78. For example, see the twenty-page bibliography assembled in "Injunctions in Labor Disputes: Select List of Recent References," *Monthly Labor Review*, September 1928, pp. 631–50; or articles in the *American Labor Legislation Review* from vol. 12 (1922) to vol. 20 (1930).
79. See G. William Domhoff, *The Higher Circles* (New York: Random House, 1970), chap. 6.
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81. *Industrial Relations Research Association, Proceedings of the Second Annual Meeting*, December 30, 1949.
82. Edwin E. Witte, *Historical Survey of Labor Arbitration* (Philadelphia: Wharton School, University of Pennsylvania Press, 1952), p. 51.
83. *A Dictionary of Arbitration and Its Terms*, ed. Katherine Seide, (Dobbs Ferry, N.Y.: Oceana Publications, 1970), p. 154.
84. See R. W. Fleming, *The Labor Arbitration Process* (Urbana: University of Illinois Press, 1965), p. 13; and Walter E. Baer, *The Labor Arbitration Guide* (Homewood, Ill.: Dow-Jones-Irwin, 1974), p. 12. The Bureau of Labor Statistics reports that 98.8 percent of contracts have grievance clauses and 96.1 percent have arbitration clauses (*Characteristics of Major Collective Bargaining Agreements*, Bulletin 1957 [1977], p. 94).
85. *Labor Relations Yearbook* (Chicago: Commerce Clearing House, 1980), p. 347.
86. Paul R. Hays, *Labor Arbitration: A Dissenting View* (New Haven: Yale University Press, 1966), pp. 53–54.
87. Federal Mediation and Conciliation Service, *31st Annual Report*, FY 1978, p. 43.
88. Paul M. Herzog and Morris Stone, "Voluntary Labor Arbitration in the United States," *International Labor Review* 82 (October 1960): 301–26.
89. *Wall Street Journal*, July 29, 1980, p. 1.
90. Killingsworth, "Arbitration Then and Now." Killingsworth reported a revealing anecdote about the original meeting of the National Academy of Arbitrators in 1947: "There was a photographer on hand to take pictures of a group of leading lights, and when the photographer said, 'smile', say 'cheese', a wag in the group said 'No, you must realize you are dealing with arbitrators. You should say "Fees" ' " (*ibid.*, p. 29).
91. J. A. Raffaels, "Needed: A Fourth Party in Industrial Relations," *Labor Law Journal* 13 (March 1962): 230–44.
92. Milton and Rose Friedman, *Free to Choose* (New York: Harcourt, Brace, Jovanovich, 1979), p. xix.
93. Domhoff, *The Higher Circles*, p. 219.
94. George Stigler, "Is American Capitalism at High Noon?" *Competition* 3 (November/December 1982): 3–4.
95. Benjamin J. Taylor and Fred Witney, *Labor Relations Law*, 2nd ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1975), pp. 157, 580.
96. See Reynolds, "The Free Rider Argument." See also Dan C. Heldman, *American Labor Unions: Political Values and Financial Structure* (Washington, D.C.: Council on American Affairs, 1977); and Dan C. Heldman, James T. Bennett, and Manuel H. Johnson, *Deregulating Labor Relations* (Dallas, Tex.: The Fisher Institute, 1981).

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Substantive Due Process and Labor Law

by Barry W. Poulson

Department of Economics, University of Colorado

Substantive due process refers to a judicial policy that substantively protects, under the due process clauses of the Fifth and Fourteenth Amendments, activities that are not elsewhere secured in the Constitution. With reference to the protection of economic liberties, the doctrine is referred to as economic due process. From its earliest days the Supreme Court had protected property rights based upon natural rights and social compact doctrine. In the middle of the nineteenth century the court turned from these so-called unwritten laws to the due process clause of the Constitution as the basis for substantive protection of property rights. Prior to the 1850's the due process clause was invoked in criminal cases to ensure the procedural rights of defendants. The first Supreme Court application of substantive due process was in the 1855 Hoboken Land decision, in which the court determined that due process relates to civil processes at common law.[1] That made it possible for the court to invoke the due process clause as a protection of property rights and to restrain legislative infringement of those rights. State courts also turned to the due process clause in state constitutions as the basis for substantive protection of property rights. The most important of these early decisions was Wynehamer v. People in 1856.[2] The New York Court of Appeals ruled that a state law regulating the sale of intoxicating beverages was unconstitutional under the due process clause. The case was important because it extended substantive due process to the use of property as well as the ownership of property.

The due process clause was invoked by the Supreme Court in the Dred Scott decision. Chief Justice Taney interpreted the due process clause as precluding federal government restrictions on an individual's liberty or property, including property in slaves:

> If the Constitution recognizes the right of the property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the government.[3]

The Thirteenth Amendment to the Constitution ratified in 1865 prohibited

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slavery and involuntary servitude. The Fourteenth Amendment secured for the emancipated Blacks the citizenship rights enjoyed by the rest of the population, and provided federal protection of those rights against infringement by the states. Section 1 of the Fourteenth Amendment reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

In the second half of the nineteenth century the doctrine of substantive due process was expanded by both the federal and state courts. Both civil as well as criminal rights were extended, bringing a broad range of economic interests within the protected area.[4] Governments could attempt to regulate an individual's right of contract, to enter a calling or trade, and to acquire property; but the government had to justify its authority. The court attempted to evaluate the legitimacy of the acts, objectives, and means used to accomplish this. As the court explained in 1894, "the means must be reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."[5] That ruling became a precedent for subsequent Supreme Court decisions providing substantive due process protection to individual liberty and property.

In a series of decisions in the late-nineteenth century the Supreme Court reinterpreted the due process clause of the Constitution. The landmark case was that of Munn v. Illinois (1877). In that case the Supreme Court upheld an Illinois state law regulating storage rates for grain warehouses. In the majority opinion Chief Justice Waite stated:

> One devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.[6]

In that case the court sustained a state regulation of grain warehouse rates on the grounds that the business was "affected with a public interest," or a "public ally." The court argued that the grain warehouse was not an ordinary business, but one of critical importance to the commerce of the country. It compared the warehouse industry to other industries subject to regulation under common law, including common carriers, ferries, grist mills, and innkeeping. The court also argued that the warehouse industry in Chicago was a "virtual" monopoly because of the absence of price competition among the nine firms operating grain elevators in that city.

The Munn decision opened up a wide range of economic activity subject to government regulation on the grounds that these activities were cloaked with the public interest. In Stone v. Farmers Loan (1886), the court upheld a state law regulating railroad rates.[7] In order to satisfy the criterion of substantive due

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process in that case the court added the proviso that regulation was not without limits. In Chicago, Milwaukee and St. Paul Railroad Co. v. Minnesota (1890) the court upheld state regulation of railroads with the specific proviso that such regulations had to be reasonable in order to satisfy the substantive due process criterion.

The courts' interpretation of "reasonable" government regulation vascillated considerably, resulting in different, and often conflicting, decisions. For example, the court sanctioned the regulation of working hours for women, but not for men. The court reversed its decision in several cases permitting government regulation which had been precluded. Legislation was approved providing for workmen's compensation, regulating wage rates, and rent control; regulations were created for the size and weight of loaves of bread, insurance rates, the size and character of packages in which goods are sold, the practice of medicine, and the training of practitioners. Legislatures could require smallpox vaccinations, prohibit the sale of adulterated food and drugs, and impose absolute liability without fault. The court permitted government regulations covering zoning, collusive practices by competitors, gambling, extortion, and usury. In these cases the Justices seem to apply their own criteria of the reasonableness of the legislation.[8]

In addition to regulatory activity we see a significant expansion in other government activities under the new interpretation of the due process clause. The government power to tax was expanded in several cases. In McCray v. United States (1904) the court upheld a differential tax on colored and uncolored margarine. This removed the constraints placed on the federal government's power to use taxes for non-revenue purposes. The police power of the state was expanded in several cases. In Champion v. Ames (1903) the court upheld a law forbidding shipment of lottery tickets under the guise of controlling interstate commerce. Two years later in Swift and Co. v. United States (1905) the court introduced the "stream of commerce" doctrine, bringing virtually every economic activity under control on the grounds that at some point it involves interstate commerce. The court sanctioned the delegation of legislative power to the executive branch of government. In United States v. Grimaud (1911) the court ruled that administrative rulings of a regulatory board had the force of law, greatly increasing the power of these executive bodies.

As these court decisions opened up a wider range of economic activity to government regulation, private interest groups responded by allocating more resources toward political action designed to transfer wealth through the public sector. Labor unions, business, and farmers found that under these new rules of the game the benefits of special interest legislation outweighed the costs of lobbying and other political action to effect political change. The result was a virtual explosion in state and federal laws regulating economic activity. Cases involving these laws swelled the court dockets and we find these same special interest groups attempting to influence the judicial process.

The courts' application of substantive due process in these cases appears to

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reflect an arbitrary and vacillating interpretation of the rule of reason by different groups of justices. A number of writers have pointed out the inconsistencies in these more recent rulings and the contrast with earlier decisions based upon natural rights and social contract. Despite these criticisms we should recognize the thread of continuity provided by substantive due process in this period and the links to an earlier tradition of due process in common law. This is best illustrated in the courts' interpretation of substantive due process with reference to labor legislation.

Based upon substantive due process the courts negated legislation restricting entry into an occupation. The slaughterhouse cases decided in 1872 were landmarks in this application of substantive due process.[9] The Louisiana legislature granted a monopoly privilege to a private corporation it had created to operate a regulated livestock and slaughterhouse business in New Orleans. Suit was brought by a group of adversely affected butchers on the grounds of subjection to involuntary servitude (in violation of the Thirteenth Amendment), and of violation of the plaintiffs' privileges and immunities as United States citizens in being deprived of liberty and property without due process of law, and of equal protection under the law (by the Fourteenth Amendment). The Supreme Court upheld the monopoly grant. At that time the majority was not prepared to regard a person's calling, trade, occupation, or labor as property, or the right to engage in it as liberty (or as property). However, the dissenting opinion in the slaughterhouse cases defined liberty and property in more expansive terms that eventually did become judicially acceptable. The minority justices saw the butchers' loss of occupation to be one of both liberty and property. In the words of Bradley:

> This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. . . . Their [citizens'] right of choice is a portion of their liberty; their occupation is their property.[10]

Swayne gave a similar meaning to property in that case:

> Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all solid individual and national prosperity.[11]

The four dissenting justices viewed the right to use one's labor in a particular occupation as a property right protected by the Fourteenth Amendment. They were willing to invoke that amendment to provide federal protection of the right of the butchers to engage in their trade free from state government regulations that violated that right. This expanded view of the protection provided by the Fourteenth Amendment to individual liberty and property would later become the foundation for substantive due process at the federal level beginning with the Allgeyer case in 1897.

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In 1883 the Supreme Court ruled that Louisiana could limit the monopoly power granted to the slaughterhouse monopoly under the federal Constitution's contract clause. In that case Justice Bradley concurred in the result, arguing that the grant of monopoly power had not been valid. He expanded on his views in the earlier slaughterhouse case:

> The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, commenced with the fundamental proposition that "all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen. . . . I hold that the liberty of pursuit in the right to follow any of the ordinary callings of life is one of the privileges of a citizen in the United States.[12]

Substantive due process was first established at the federal level in Allgeyer v. Louisiana (1897).[13] A Louisiana law made it illegal for a person, firm or corporation to obtain insurance from an out of state company that had not been licensed by the state. Allgeyer was charged with entering into a contract for insurance with a New York insurance company that was not licensed in Louisiana. The Supreme Court ruled in Allgeyer's favor that the state law violated his liberty of contract under the Fourteenth Amendment. Justice Peckham maintained that:

> The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[14]

Thus, the Allgeyer case launched an era in which the right of individuals to enter into contracts including the pursuit of an ordinary calling or trade was protected under the due process clause of the Constitution.

State court decisions also affirmed the right of individuals to enter into contracts, including the sale of one's labor, free from governmental regulations and restrictions. A Pennsylvania court in ruling against legislation regulating wage rates maintained that such an act was:

> an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. . . . He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void.[15]

The liberty to enter any lawful occupation was affirmed by the Arkansas Supreme court:

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> The right to acquire and possess property necessarily includes the right to contract; for it is the principal mode of acquisition, and is the only way by which a person can rightly acquire property by his own exertion. Of all the "rights of person" it is the most essential to human happiness. . . . A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit; and as incident to this, is the right to labor and employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell or convey property of any kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression.[16]

Another important application of substantive due process was with reference to laws regulating the hours and conditions of work. The case of Lochner v. New York (1905) dealt with a New York law establishing sanitary and other working conditions for bakeries and limiting to sixty the number of hours an employee in such establishments could be required or permitted to work each week, with a maximum of ten hours a day.[17] Lochner, a baking establishment, was convicted of violating the law, but appealed on the grounds that the law violated his liberty under the due process clause. The Supreme Court ruled that the state must justify the law:

> The act must have a . . . direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.[18]

The Supreme Court accepted the portions of the New York law dealing with sanitation and working conditions as a valid exercise of the police power of the state in terms of these criteria. However, the court found that the limitation on working hours failed the means-end test. The state failed to prove that a material danger to the employees or the public's health would exist if working hours were not curtailed pursuant to the legislation. Peckham, speaking for the majority, observed that the court had upheld a Utah law limiting employment in underground mines and smelters to eight hours a day except in cases of emergency. But the majority found that the New York law covered a situation that was far less perilous and which permitted no exceptions. Considerable evidence was presented that the New York law would increase worker health and well-being. However, the court ruled that such evidence is not in itself sufficient to justify legislative interference in the right of individuals to contract regarding hours of work. Justice Peckham pointed out that limitations upon hours "might seriously cripple the ability of the laborer to support himself and his family."[19] Smaller bakeries in New York depended on longer working hours than those required by larger bakeries. The effect of the New York legislation in limiting hours of work would have been to increase costs for small bakeries, putting some of them out of business and reducing employment opportunities for bakery employees. On bal-

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ance, the court found that any benefits in health and well-being that might accrue from restrictions on work hours would not be sufficient to offset the costs to workers in reduced earnings and lost employment opportunities; and therefore the infringement of the individual's right to contract under due process was not warranted.[20]

Substantive due process was at issue in two famous cases involving labor unions early in the twentieth century — Adair v. United States (1908) and Coppage v. Kansas (1915).[21] In both cases the Supreme Court set aside the conviction of a railroad agent who had fired a railroad employee for joining a union. At issue in the Adair case was a federal statute outlawing the so-called "yellow dog" contract; while Coppage involved a similar statute enacted by the Kansas legislature. Both laws were defended as promoting the growth of unionism, which, it was argued, was essential for public welfare. The majority of the court found that whatever benefits might accrue to public welfare from government support of unionism did not justify government interference in the right of the employer to contract with employees. The right of an employer to hire and fire employees was viewed as the counterpart to the right of employees to offer their labor services and to quit an employment. These cases are interesting because they apply substantive due process and explicitly reject adjudication based upon the impact of legislation on equality. In this sense these decisions, based upon substantive due process, reaffirm an entitlement theory of justice as opposed to an egalitarian theory of justice. In the Coppage case Justice Putney defended the antiunionism requirement as a valid exercise of the employees' right to contract:

> there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. . . . This applies to all contracts, and not merely to that between employee and employer. Indeed a little reflection will show that wherever the right of private property and the right of free contract coexist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposed to give in exchange. And since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.[22]

The Adams and Coppage decisions reflected an era when the courts saw no constitutional basis for government laws supporting unionism. They did not accept the paradigm of the modern era in which public policies in support of labor unions and collective bargaining are defended as benefits to public welfare. Indeed, the courts challenged many union practices as contrary to the public welfare, including strikes, pickets, threats, and violence. When union practices violated the rights of employers and nonunion employees, the courts were not

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averse to applying substantive due process to protect those rights. This attitude of the courts was a major factor in the tendency for public policies in general to take a neutral approach toward unionism and collective bargaining up to the 1930's.

Conclusion

The courts' interpretation of substantive due process placed constraints on the power of government to infringe upon economic liberty in the late-nineteenth and early-twentieth centuries. Surprisingly, the role of the court in this era of substantive due process has been criticized both by writers who support constitutional limits on the expansion of government power and by writers sympathetic to a ubiquitous role for government in the economy. The former point to this period as marking the transition from a *laissez faire* economy in which incentives were biased toward productive activity increasing total wealth, toward a society in which greater incentives existed for transfer activities, and especially transfers of wealth through the public sector.[23] They point to the rapid growth of government and the more ubiquitous role of government in economic activity. They maintain that the courts' reinterpretation of the due process clause was crucial in establishing a legal environment within which this expansion in government could take place.

One approach in analyzing the effectiveness of the courts in coping with this mass of government legislation is to calculate the amount of legislation invalidated. Between 1868 and 1912 the Supreme Court struck down a little more than six percent of the cases it heard; from 1913 to 1920 the percentage rose to approximately seven percent; and from 1920 to 1928, to twenty-eight percent.[24] While the 1920's appears to be the high point in the Supreme Court's application of substantive due process to invalidate legislation, its role in the prior period is not insignificant. State courts also negated a great deal of legislation infringing upon individual liberty and property, based upon substantive due process.[25]

A survey of these cases reveals a wide range of economic liberties brought under the protection of substantive due process. The legislation invalidated by the Supreme Court included artificial barriers to entry into a business created by government, laws prohibiting the operation of a particular business, regulations over prices, and regulations of the wages, hours, and working conditions for labor.[26] State courts negated a wide range of legislation including:

1. laws prohibiting the manufacture of products in one's home,
2. laws forbidding business from keeping their shops open on Sunday,
3. laws forbidding workers from working in excess of eight hours per day,
4. laws forbidding employers from firing workers who joined or remained in unions,
5. laws restricting entry into an occupation.[27]

Those who are sympathetic to an expanded role for government in economic activity criticize the substantive due process justices on the grounds that their decisions were arbitrary and capricious. They maintain that the interpretation of the "rule of reason" reflected the influence of specific interest groups and the

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inherent biases of a court drawn from a legal profession representing propertied interests.

> The question of reasonableness or arbitrariness of a law could not be settled by reference to any specific constitutional provision or any absolute principle of law. A reasonable law was one that seemed sensible, plausible, and intelligent to the judges who passed upon it. . . .
>
> What constituted sensible, plausible, and intelligent public policy, however, is largely a matter of the individual's economic and social philosophy — his standard of values. When the court applied the test of reasonableness to legislation, therefore, it measured the law against its own economic and social attitudes. If in the light of these attitudes the law seemed intelligent, the justices upheld it; if not, they declared it unreasonable, arbitrary, and a violation of due process of law.[28]

Our brief survey of substantive due process with reference to labor legislation reveals that substantive due process justices believed that economic liberties should be protected under the Fifth and Fourteenth Amendments. They were willing to invoke substantive due process to negate legislative infringement on the individuals' right to enter an occupation, and on the freedom of employers and employees to contract for labor services. These economic liberties were not absolute, but before the state could infringe upon those liberties it had to show that the ends were justified and that the legislation was a reasonable means to that end. This required that the courts analyze the economic impact of the law and attempt to assess the effectiveness of that legislation in achieving those objectives. The criterion for that evaluation was the reasonableness of the legislation in the eyes of the court. The "rule of reason" left a wide scope for judicial interpretation depending upon the point of view of the justices at any point in time.

It should not be surprising that the interpretation of the "reasonableness" of legislation changed over time with changes in the composition of the court. Yet there was also a continuity in the protection of economic liberties under substantive due process, which was linked to an earlier tradition in common law protecting economic liberty and property rights. That tradition was based upon a philosophy of *laissez faire* which Professor Aaron Director has described in the following terms:

> Laissez faire has never been more than a slogan in defense of the proposition that every extension of state activity should be examined under a presumption of error. The main condition of economic liberalism has always assumed a well established system of law and order designed to harness self-interest to serve the welfare of all. The institution of private property — at least since Hume — has always been defended on this ground. And, wherever it seemed that this institution might be modified without subverting the general framework of a competitive society, the tradition has shown a readiness — perhaps exaggerated — to modify this basic institution. But the tradition goes much beyond this. It has always assumed that there were some economic results which cannot be attained at all or attained only in appropriate amounts if left to the free market.[29]

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In the context of this philosophy, the courts in the era of substantive due process performed effectively as an independent judiciary protecting economic liberty under the Constitution.

NOTES

1. Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1855).
2. Wynehamer v. People, 13 N.Y. 378 (1856).
3. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450–51 (1857).
4. See Bernard H. Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980), pt. 1.
5. Lawton v. Steele, 152 U.S. 133, 137 (1894).
6. Munn v. Illinois, 94 U.S. 113 (1877).
7. Stone v. Farmers Loan and Trust, 116 U.S. 307 (1886).
8. Siegan, *Economic Liberties,* pp. 152–55.
9. 83 U.S. (16 Wall.) 36 (1872).
10. *Ibid.* at 116 (Bradley, J. dissenting).
11. *Ibid.* at 127 (Swayne, J. dissenting).
12. 165 U.S. at 589–90, citing Butchers Union Co. v. Crescent City Co., 111 U.S. 746, 762 (1883) (Bradley, J. concurring).
13. 165 U.S. 578 (1897).
14. *Ibid.* at 589.
15. Godcharles and Co. v. Wigeman, 113 Pa. 431, 437, 6A. 354, 356 (1886).
16. Leep v. St. Louis, I.M. and S. Ry. Co. 58 Ark. 407, 415, 422, 25 S.W. 75, 77, 79 (1894).
17. 198 U.S. 45 (1905).
18. *Ibid.* at 57–58.
19. *Ibid.* at 59.
20. Siegan, *Economic Liberties,* pp. 115–21.
21. 208 U.S. 161 (1908) and 236 U.S. 1 (1915).
22. 236 U.S. at 17.
23. See, for example, Terry L. Anderson and Peter J. Hill, *The Birth of a Transfer Society* (Stanford, Calif.: Hoover Institution Press, 1980).
24. Ray A. Brown, "Due Process of Law, Police Power, and the Supreme Court," *Harvard Law Review* 40 (1927): 943, 945, n. 11.
25. Siegan, *Economic Liberties,* pp. 55–59.
26. *Ibid.*, pp. 126–55.
27. *Ibid.*, pp. 55–59.
28. Alfred H. Kelly and Winfred A. Harbison, *The American Constitution*, 4th ed. (New York: W. W. Norton & Company, 1970), p. 527.
29. Aaron Director, "The Parity of the Economic Market Place," *Journal of Law and Economics* 7 (1964): 1–2.

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Could There Be Universal Natural Rights?

by Antony Flew

Department of Philosophy
York University, Toronto

Perhaps it is not exactly a matter of "a decent respect to the opinions of mankind." Nevertheless, just as it would be uncultivated and indecorous for a paper on crime and punishment to make no mention of the eponymous masterpiece of Fedor Dostoievsky, so the present essay has properly to begin by repeating certain famous words of Jeremy Bentham. He, as all will remember, dismissed the topic of natural rights with a truly Johnsonian finality. The whole thing is just one of the *Anarchical Fallacies*: "Right is the child of law; from real laws come real rights, but from imaginary law, from 'laws of nature', come imaginary rights. Natural rights is simple nonsense, natural and imprescriptable rights rhetorical nonsense, nonsense upon stilts."[1]

I am here undertaking to investigate precisely, and indeed only, what Bentham rejected. My concern, or my direct concern, is not with those rights which are in fact realized or recognized, endorsed or created, by various systems of positive law. It is instead with natural rights, and then only with such of these as may or might be universal. It is with rights, that is, in as much and in so far as these either do serve or could serve as a basis for criticizing both types or tokens of individual conduct, and general principles or particular prescriptions of positive law. Such moral criticism must result in commending whatever respects, and condemning whatever violates, whatever natural and universal rights there are.

Finally, in the beginning, let it be emphasized that the title of the present paper provides a true index of its limited scope. It is, solely, a consideration of whether there could be such universal and natural human rights, or whether such a suggestion is indeed "simple nonsense." So on this occasion no attempt will be made definitively to establish what, if any, there actually are.

I. The Objectivity of Rights

The phrase "objectivity of rights" is, unequivocally and defiantly, both categorical and existential. It thus epitomizes the first conceptual truth in this area. This is at the same time the reason why so many modern-minded people are inclined to follow Bentham in dismissing the whole business. The point has been well put by one who claims — I must confess that I almost wrote "pretends" — to be himself *Taking Rights Seriously:* "A great many lawyers are wary of talking of moral

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rights, even though they find it easy to talk about what it is right or wrong for governments to do, because they suppose that rights, if they exist at all, are spooky sorts of things that men have in much the same sort of way that they have non-spooky things like tonsils.''[2]

No doubt there is room for discussion about exactly how far and in what ways having a natural right is or would be like having tonsils. But the wary lawyers of whom Dworkin speaks are not wrong in thinking that an affirmation of rights is necessarily an affirmation that certain entitlements possess some kind of objectivity. Take, for instance, what are for us the key words of that most famous and most important of all such declarations: ''We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights. . . .''

At least for present purposes it is unfortunate that the Founding Fathers spoke of these rights as an endowment from the Creator, thus suggesting that they are, if only under the Divine Law, also legal. But what does come out with total clarity is that they saw themselves as at this point asserting truths rather than making demands, as reporting revelations of the natural light rather than announcing decisions of revolutionary policy. I conclude, therefore, that the first essential of any natural right is that it must possess some kind of objectivity. If anyone is going to maintain, against Bentham and so many others, that there are such rights, then they have somehow got to show: both how this can be possible; and that it is the case.

(a) It appears that in the past these were often not seen to be problems or, if they were so seen, they were considered to be soluble — as the Signers thought to solve them — by some reference to the Creator. In the Declaration itself the reference is perfunctory. But in that same year 1776 John Adams was speaking of ''Rights antecedent to all earthly government — Rights that cannot be repealed or restrained by human laws — Rights derived from the great legislator of the universe.''[3] Our natural and inalienable rights are thus endowments from God, and their objectivity is the objectivity of a prime theological fact. That is a kind of fact, or a putative kind of fact, which Dworkin's wary lawyers might perhaps be pardoned for eschewing as ''spooky.'' But we have to object to this move here on a quite different ground: neither maintaining, as atheists, that there are no positive theological facts; nor, as agnostics, contending that, even if such there be, it is impossible for us to know what they are. Our present objection has to be that rights conferred under God's prescriptive and positive law would not be rights of the kind presently under discussion. They could not, that is to say, be rights by reference to which all prescriptions of positive law — repeat, all — might in principle be criticized.

The heart of this particular matter of logic was first laid bare by Plato's *Euthyphro*:[4] if you define a word such as ''good'' in terms of the will of God, then you thereby disclaim all possibility of praising that will as itself good. So the words ''God is good'' become on your lips the expression of only the most empty and formal of custom-built[5] necessary truths.

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It is clear that Grotius too was master of the crucial points. He was writing in general about the law of nature, not particularly about the rights arising either under that law or independently of it. He stresses first the necessary objectivity of that law: its principles, "if only you pay strict heed to them, are in themselves manifest and clear, almost as evident as the things we perceive by the external senses; and the senses do not err if the organs of perception are properly formed and if the other conditions requisite to perception are present."[6] He then goes on to insist that this objective law is no sort of function or creature of the will of God: "The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God. The acts in regard to which such a dictate exists are, in themselves, either obligatory or not permissible, and so it is understood that necessarily they are enjoined or forbidden by God."[7] The last and most emphatic words, insisting both on the objectivity of the law of nature and on its total independence from the will of the Creator, draw a comparison with the truths of logic and pure mathematics: "The law of nature, again, is unchangeable — even in the sense that it cannot be changed by God. . . . Just as even God . . . cannot cause that two times two should not make four, so He cannot cause that that which is intrinsically evil be not evil."[8]

Before leaving both Grotius and the rejected suggestion that moral rights could be creatures of the Creator's will, there are two things to underline. First, both in identifying prescriptive laws of nature as dictates of right reason and in comparing them with the truths of pure mathematics Grotius can be seen as indicating — a century before Kant was born — a Kantian route towards the solution of our objectivity problem. That, in correspondingly Kantian terms, is to show how rights are possible — how there can be, and that there are, such Popperian Third World entities as objective entitlements. Second, in insisting that actions have in them "a quality of moral baseness or moral necessity," that they are, in themselves, either not permissible or obligatory, Grotius can be seen as signposting, before the birth of G. E. Moore — this time not one but two and a half centuries before — what we must surely recognize to have been a blind alley. After all, what are these intrinsic characteristics if not the "simple, non-natural qualities" of *Principia Ethica* — qualities which must as "non-natural" be paradigmatically "spooky"?[9]

(b) The enormous obstacle to any attempt to show how (moral) rights can possess some kind of objectivity, and to show that and what these rights are, is the whole great Humean tradition of philosophy and social science. Epitomized in the proverbial nutshell, it is the glory of Hume to have developed a world-outlook through and through secular, this-worldly, and man-centered. To us the most relevant aspect of all this is Hume's anti-Copernican counter-revolution. Copernicus was said to have knocked man and his Earth from the center of the Universe, by revealing that what appears to be the diurnal circulation of the heavens above us and around us really is a movement of our own peripheral planet. Hume took as

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his model a supposed discovery of the new science of Galileo and Newton, the supposed discovery that secondary qualities are not really qualities of things in themselves, but are instead reactions in our own minds, reactions which, by a false projection, we commonly but mistakenly attribute to those things. Guided or misguided by this seductive model, Hume hoped to demonstrate that the same applies to much else which we might uninstructedly have believed to be characteristic of the Cartesian external world: in particular, causal connection, the necessity of descriptive laws of nature, and moral and aesthetic values.[10]

In this Humean perspective it becomes almost impossible to admit as objective anything but straightforward, unspooky matters of natural fact about that external world; while the norms and values which are somehow projected functions of individual or collective human desire appear as correspondingly subjective. It is easy then to proceed, although Hume himself would never have dreamed of so proceeding, to the demoralizing conclusion that they are as such to be despised and dismissed as *merely* human creations. It is upon philosophical assumptions of this kind, and in the same sort of understanding of the findings of the social sciences, that today so many of the young, and of the not so young, believe the slightest tincture of anthropology or sociology is enough to expose all value judgments as inherently and essentially arbitrary, relative, and subjective.

If we are to succeed in showing how natural rights are possible, by providing for them a kind of objectivity, then we have either to circumvent or to overcome the particular subjective/objective dichotomy which is the form of representation in the previous paragraph. We have to find a way in which something can be objective, in the rather different but sufficient sense of being independent of our self-interested and capricious wills, while at the same time in some way authoritative over those wills; without that something's being just a matter of brute fact about either non-human or human nature.

Here it should be instructive to ponder again the last words quoted earlier from Grotius. Logically necessary truths are objective in precisely the sense just explained, and they neither are nor state facts about either human or non-human nature. It is a matter of individual or collective human choice — though certainly not by that token merely a matter of arbitrary choice — what concepts we use, and what words we employ to express those concepts. But it is not a matter of choice, whether human or Divine, what follows or does not follow from this or that proposition. We have therefore, truths here which are in the required sense objective. If the conclusion drawn does follow, then the inference is correct; and if not, not.

Of course the general claim that there are natural rights, as well as less general claims about the subsistence of this or that particular right, seem to be far removed from the abstract truths of logic and mathematics. Nevertheless, and without aspiring to produce the sort of system of casuistical moral geometry once envisioned by John Locke,[11] it does look as if, given the basic concepts of morality, it might be possible to deduce some conclusions about rights. Let this reference to other examples of the sort of objectivity we crave serve to encourage our philosophical investigations.

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II. The Groundedness of Rights

The first conceptual truth about rights is that they are entitlements which must possess some kind of objectivity. The second is that they are entitlements which have to be grounded in — which is not to say deduced from — some fact or facts about their bearers. Suppose that two bearers of rights are to be said to have different rights. Then this difference has to be justified by reference to some dissimilarity between what each has done, or suffered, or is.

Suppose, on the other hand, that two bearers of rights are to be said to have the same right. Is there then no parallel necessity that in both cases these be identically grounded?[12] Two or more different foundations might conceivably give rise to one and the same right; a particular sum, for instance, might have been promised as the reward for two quite disparate performances; indeed in one or the other case it might have been promised unconditionally.

That all this is so — if indeed it is all so — is a purely formal truth. It places no substantial restriction on the respects in which bearers of rights must themselves either be or have been similar or different if they are to be said to have the same or different rights. It is also a formal truth about all rights, and not only about any which may be both universal and natural. Thus it is perfectly proper to say that we all have acquired moral rights to the fulfillment of any promises made to us; notwithstanding that the only facts about us on which these particular rights have to be grounded are the facts that we are the people to whom these promises were in fact made; and notwithstanding that the original selection by the promisors of us as the promisees could conceivably have been wholly random and gratuitous. A right, as Stanley Benn nicely puts it, "is a normative resource";[13] and I may acquire such a resource without any antecedent desert or entitlement to warrant this acquisition. Indeed, since the notion of desert surely presupposes that of entitlement[14] — entitlement, that is, to whatever personal factors are exercized in the conduct producing that desert — there could be no entitlements at all unless some of these were themselves unwarranted by desert.

It needs to be emphasized also that this grounding of rights upon facts about the bearers of those rights involves no violation of Hume's Law.[15] Conclusions about what ought to be are not being deduced — nor could they be validly so deduced — from premises themselves purely neutral and detached, premises stating non-committally only what is the case. It may appear that this impossibility is being actualized, especially if we continue to attend to the example of promising.[16] Can we not, it may be asked, more or less brashly, deduce "Brenda has a right to receive $100 from Burl" from "Burl promised Brenda to give her $100"?

Yes, indeed we can. But the premise in this valid deduction is no more purely neutral and detached than the conclusion. Both express commitment to the institution of promising. What would not legitimate the move to "Brenda has a right to receive $100 from Burl" would be any one of the corresponding reports by some truly non-participant social observer, such as the report: "Burl said to Brenda, 'I promise to give you $100.' " (Compare, and perhaps contrast too, the way in which the truth of that dull proposition p can be deduced from the truth of the

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proposition 'Letitia knows p'; whereas from the truth of the likes of the very different proposition, 'Letitia said, "I know p" ', it cannot.)

This second conceptual truth about rights is one particular case of a much more general truth about all appraisal and valuation. So, in making both the particular and the general point we are, as "the implacable Professor" J. L. Austin used to say, "looking not *merely* at words . . . but also at the realities we use words to talk about: we are using a sharpened awareness of words to sharpen our perception of the phenomena."[17]

The general truth is that in appraising and valuing — as opposed to either stating our likes and dislikes or simply reacting with squeals of delight or howls of anger — we are engaged in an essentially rational activity; albeit an activity which is, as far as the present point is concerned, essentially rational only in the thin sense that in it we necessarily commit ourselves to returning the same verdicts in all other similar cases. Even this is by itself sufficient to rule out all analyses of, for instance, "She is a good woman" in terms simply of anyone's likes or dislikes;[18] to say nothing of the still more implausible suggestion that it means instead something like, "She is a woman: hooray!"

Another corollary is the elimination of Moore's account of value in *Principia Ethica*, at least in its most famous formulation. Whatever we conclude about Hume's contention that value characteristics are really reactions in our minds, falsely projected out onto their provocations, we still cannot allow that they are like colors. For two objects may be for all practical purposes identical, save that one is yellow while the other is not: it happens all the time. Yet it cannot happen that two objects are similarly identical, save that one is a good one and the other is not. It must, I conclude, be by the same token incoherent to maintain that, of two people who are the same in respect of whatever may be allowed to constitute the grounds of some right, one is, and the other is not, endowed with that normative resource.

III. The Reciprocity of Rights

In a methodological manifesto which is at the same time an exquisite philosophical masterpiece, J. L. Austin concluded a paragraph on "the Last Word" with the willing concession: "Certainly, then, ordinary language is *not* the last word: in principle it can everywhere be supplemented and improved upon and superseded. Only remember, it *is* the *first* word."[19] The conceptual truths about rights presented in the two previous sections are, I believe, firmly grounded upon established usage of the word "right". But some points in this third section do involve some supplementing, improving and superseding.

(a) This is surely true of the proposal that rights be attributed only to those capable of — or, to allow for infants, capable of becoming capable of — themselves claiming rights for themselves, and in and by that claim undertaking the reciprocal obligation to respect the rights of others. Some people do in fact speak about the rights of the brutes, and even of trees; and any deficiency which they display in so doing is not one of basic word-training. The United Nations

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Educational Scientific and Cultural Organization, for instance, recently adopted, with all customary brouhaha, a Universal Declaration of the rights of Animals.

This new declaration, which was supposed to become U.N. law in 1980, begins by asserting "that all animals are born with an equal claim on life and the same rights to existence." It then proceeds to spell out the human duties implied by these brute rights: "No animal shall be exploited for the amusement of man," for one; and, for another, "scenes of violence involving animals shall be banned from cinema and television." To no one's surprise the charter skirts the awkward issue of killing animals for food. Yet it makes up for this with a bold declaration that "any act involving mass killing of wild animals is genocide."[20]

The proposal that rights should be ascribed only to potential claimers and protectors of the same does not, of course, foreclose on the possibility of insisting that all cruelty is wrong. Here the question is indeed, as Bentham urged, not " 'Can they *reason*?' nor 'Can they *talk*?' but, 'Can they *suffer*?' "[21] It could be — I affirm that it is — that we should treat the brutes with a kindness and restraint which they have no right to demand; just as, as we shall shortly be reminding ourselves, we have some duties to persons which those persons have no right to demand.

(b) The previous subsection suggested that a universal reciprocity should be made essential to the idea of rights: that is, that rights should be ascribed only to those capable of themselves claiming rights for themselves, and in and by that claim undertaking the reciprocal obligation to respect the rights of others. The present subsection brings out that and how it might be a good thing that someone should have something, or should be treated in some way, and even that it might be someone's duty to secure these objectives, without its being the case that the beneficiary has a right to be provided with that something, or to be treated in that way. The most obvious, least controversial, yet by itself decisive example is that of my promising you to give something, or to do something, to him. My promise creates your rights to its fulfillment, but gives him no new rights or duties. Another favorable and scarcely controversial example is that of man drowning; it may be my duty as a chance passerby to effect a rescue; but it is not his right that I should. The upshot is that whereas all rights generate some corresponding duties — the duties, namely, of respecting those rights — it is not inconsistent to speak of duties without any corresponding rights. The Chairman of the (antivoluntary euthanasia) Human Rights Society was not, therefore, formally contradicting himself when he announced recently: "There are no such things as rights. You are not entitled to anything in this Universe. The function of the Human Rights Society is to tell men their duties."[22]

In our century, and especially since the end of World War II, people have become increasingly inclined to affirm that we all have rights to whatever it is thought would be good for everyone to have. It is significant that modern declarations of human rights are much longer than those adopted in the American and French Revolutions of the eighteenth century — as well as being far less well-written. The most notorious, that adopted by the General Assembly of the United

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Nations in December 1948, covers in my text six printed pages. Among many other things, it tells us: that "Everyone, as a member of society, has a right to social security" (Article 22); that "Everyone has the right to . . . periodic holidays with pay" (Article 24); and that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family . . . and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control" (Article 25). And it states further (Article 26): "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory," and so on, through a clause specifying that it must "further the activities of the United Nations," to the slightly incongruous afterthought conclusion that "Parents have a prior right to choose the kind of education that shall be given to their children."

To someone detecting, and objecting to, a note of unfashionably reactionary ridicule in the previous paragraph, my reply must be that any formulation of such claims, and any reporting of them, is bound to sound absurd. This is so for the excellent Groucho Marxist reason that they are absurd. The absurdity derives from three connected causes. First, no even halfway systematic rationale is or, it seems, could be offered to justify the inclusion of all and only those members actually admitted into this particular miscellany of claims. Second, they are put forward as universal and natural, notwithstanding that many if not most are demands which it would not be sensible to make against anything but a modern industrial state. Third, nearly all the items on the U.N. list are welfare rather than option rights; claims, that is, that everyone must be supplied with some good — educational services, perhaps, or a holiday with pay — rather than claims that in some directions everyone must be left to their own devices.

The three famous option rights of the American Declaration of Independence are rights only to non-interference. As such they must be and are rights against all comers, everywhere and at all times, rights which everyone else has corresponding and completely reciprocal duties to respect. My rights to do whatever I wish provided only that I harm no one else become the grounds for everyone else's rights to do the same; and the other way about. It was because reciprocity is and has to be the secret of any systematic rationalization of natural rights that I was in the previous subsection 3(a) so reluctant talk of the rights of brutes.

But the proposed U.N. welfare rights are rights to provision to which there surely cannot be corresponding and reciprocal moral duties.[23] It may perhaps be all very well to maintain that all these welfare rights ought to be legally established whenever and wherever it becomes practially possible to guarantee so ambitious a distribution. But if we are going to say that anyone has a moral right to any such goods, then we surely have to explain upon which individuals the duty falls to provide just which of these various goods, and to whom — and why. Since there is, surely, no possibility of excogitating an answer to this challenge which would be in any degree plausible or precise, I conclude that any natural and universal rights cannot be of the welfare kind.[24]

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IV. Rights and Compulsions

Herbert Hart once asserted that the notion of a right is "peculiarly connected with the distribution of freedom of choice."[25] Of welfare rights this is scarcely true. There would, surely, be neither contradiction nor even paradox in the contention that every child of school age has a right to attend some educational institution; and, furthermore, that they should all be effectively compelled so to do. But of option rights Hart's thesis is both true and necessarily true. There are, however, many whom its truth has escaped, and does still escape. This is in part because the practical implications are in some cases both very important and to many uncongenial, and in part because the basic distinction between two possible kinds of rights has not been taken.

Now consider two such cases. These two cases, about both of which I propose to go to town, possess a salutary complementarity. Those sympathetic in one are most unlikely to be sympathetic in the other. Yet if both these option rights are conceded there is no escape from accepting both implications.

(a) First, in Britain both the industrial Trades Union Congress and its political creature, the Labour Party, lose no opportunity of insisting upon the workers' inalienable rights to form and to join labor unions.[26] But they also demand and, so far as they can, enforce closed shops. Thus British Rail and other state monopolies — with the full support of the TUC, the Parliamentary Labour Party, and the Cabinet, indeed at their behest — have during the seventies dismissed many employees with records of long and impeccable service on the sole grounds that they were so cross-grained, or so principled, as to refuse to join the approved (and, of course, Labour Party affiliated) trades union.

In proclaiming the general right of association, both the U.N. Universal Declaration of Human Rights and the later specifically European version make it quite clear that this right is the right to join or not to join, at will. Carping critics have even suggested that this is one reason why the TUC and the Labour Party are so hostile to the institutions of the European Community; and certainly it is true that efforts are even now being made to get the related judicial institutions to condemn the British socialists' tyrannical violations of this right. The same critics would explain the failure to extend the hostility to the UNO by pointing out that, in its in any case largely disingenuous declaration, while Article 23(4) reads specifically, "Everyone has the right to form and to join trades unions for the protection of his interests," it is only elsewhere in Article 20(2), that the correlative general freedom not to join gets a mention: "No one may be compelled to belong to an association."

(b) A second, equally contentious but less parochially British-political illustration is provided by what the Founding Fathers put first, namely, the right to life. If this is, as it surely is, an option rather than a welfare right, then it must embrace a complementary right to death. What is the right to life if it is not the right, so long as nature permits, to go on living, or not, as I choose? Certainly it is at least the right not to be killed by anyone else; unless and until I forfeit that right

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by, for instance, doing murder. But surely, as an option right, it must also and necessarily keep open the alternative of suicide, and even of the assisted suicide that is voluntary euthanasia.[27] Nor is it to the point to insist that few if any of the Signers thought that they were putting their names to a demand for the decriminalization of suicide and assistance to suicide. Maybe they did not, any more than many of them saw that their demands must apply also to women and to blacks. But what these or any other utterances actually imply is determined by their conventional meanings rather than by the fleeting intentions of particular utterers.

To round off this part of the discussion, let us ponder a short item from a recent issue of that doughtily libertarian magazine *Reason*: "Our second Doublespeak Award goes to Mr. James Loucks, President of Crozer Chester Medical Center of Chester, Pennsylvania. Loucks got a court order allowing his hospital to give a Jehovah's Witness a blood transfusion. The woman had requested in writing that the hospital respect her religous beliefs and not give her a transfusion under any circumstances, but Loucks says he ignored her wishes 'out of respect for her rights.' "

V. Moral Fundamentals and Option Rights

As was emphasized from the beginning, the present paper will make no attempt definitively to establish what, if any, natural and universal rights there are. It must suffice simply to suggest, in the light of the points thus far raised, that it should be possible to demonstrate from a commitment to the application of the fundamental moral ideas that something very like the option rights doctrine of the American Declaration of Independence must follow. Suppose we allow, as we surely must, that Immanual Kant approached very close to an understanding of these moral essentials. Then consider "The Formula of the End in Itself." After taking "rational nature" as "something *whose existence* has *in itself* an absolute value," Kant's Categorical Imperative becomes: "*Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.*"[28]

These formulations as they stand will, of course, not do. One sufficient reason why they will not do was urged by Kant's admiring critic Schopenhauer. It is, strictly, incoherent to speak of "ends in themselves." There can no more be "ends in themselves" unrelated to the persons whose ends they are, than there can be sisters in themselves, unrelated to any siblings of whom they are the sisters.[29] Again, Kant's talk of "rational natures" and of "rational beings" is likely to suggest nothing but creatures who are rational as opposed to irrational, or who are intellectual and unemotional as opposed to lowbrow and emotional. But the rational beings to all of whom the imperatives of morality apply, and "*whose existence*" might be said to have "*in itself* an absolute value", are not an exclusive band of Platonic dialecticians. Nor are they, what nothing could be, ends in themselves. What they are is the very creatures we all are: creatures, that is, which are able to, and cannot but, form ends for themselves and which in

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giving to themselves or to others their reasons for acting thus but not thus are, however irrational or non-rational those reasons, rational beings.

From these familiar non-moral facts of our human nature nothing can be immediately deduced about either any rights which must be possessed by, or any obligations which must be incumbent on, beings such as we. However, to borrow another characteristic concept from Kant, "as legislating members of the Kingdom of Ends," as creatures prescribing laws to apply to all such creatures, creatures adopting and pursuing ends for themselves, we ourselves can lay it down that all rational agents are to be respected in their pursuit of their own chosen ends; or, in the favorite words of a more recent generation, their doings of their own things. Indeed, if we are committed to prescribing principles to apply equally to all such beings, principles which as ourselves such beings we could will to become universal law, then it would seem that we can scarcely fail to prescribe: both that all individuals must have the right to pursue their own ends, save in so far as this pursuit violates the equal rights of others; and that everyone must be under the reciprocal and corresponding obligation to respect those equal rights of everyone else.

The notions of equality and of reciprocity enter here because no one can consistently claim such universal human rights for themselves save in so far as they concede to others the same rights, the same liberties. The content of such rights cannot but in consequence be the same for all. An agreeably unhackneyed statement is provided by the 1945 constitution of Kemalist Turkey: "Every Turk is born free and lives free. He has liberty to do anything which does not harm other persons. The natural right of the individual to liberty is limited only by the liberties enjoyed by his fellow citizens." The practice presents every kind of problem. The principle is luminous.

NOTES

1. *The Collected Works of Jeremy Bentham*, ed. J. Bowring (London, 1843), 2:501.
2. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), p. 139.
3. Quoted by E. S. Corwin, *The Higher Law Background of American Constitutional Law* (Ithaca, N.Y.: Great Seal, 1955), p. 79.
4. The key passage can be found, with some discussion of its importance, in my *An Introduction to Western Philosophy* (Indianapolis, Ind.: Bobbs-Merrill, 1971), pp. 26ff.
5. I hope that my information that this is the American English equivalent of the English English "made-to-measure" is correct.
6. Hugo Grotius, *The Law of War and Peace*, trans. F. W. Kelsey, with an introduction by J. B. Scott (Indianapolis, Ind.: Bobbs-Merrill, 1925), p. 23.
7. *Ibid.*, pp. 38–39.
8. *Ibid.*, p. 40.
9. G. E. Moore, *Principia Ethica* (Cambridge: Cambridge University Press, 1903), *passim*.
10. For a development and defense of this not very controversial interpretation of Hume, see the relevant chapter of D. J. O'Connor, ed., *A Critical History of Western Philosophy* (New York: Free Press of Glencoe, 1964).
11. John Locke, *An Essay concerning Human Understanding*, bk. 4, chap. 3, sec. 18–19.
12. Compare A. M. Honoré, "Social Justice," in R. S. Summers, ed., *Essays in Legal Philosophy*

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(Berkeley and Los Angeles: University of California Press, 1968). Honoré argues that the rule "Treat like cases alike" does not entail "Treat unlike cases unlike" (p. 68).

13. Stanley Benn, "Human Rights — for Whom and for What?" in E. Kamenka and A.E-S. Tay, *Human Rights* (London: Edward Arnold, 1978), p. 64.
14. See, for instance, my *The Politics of Procrustes* (London and Buffalo: Temple Smith, and Prometheus, 1981), chap. 4, sec. 1.
15. See David Hume, *A Treatise of Human Nature*, bk. 3, chap. 1, sec. 1. Hume's Law should not be confused with Hume's Fork: the second expression refers to the aggressive employment of his distinction — made most clearly in *An Inquiry concerning Human Understanding*, sec. 4, pt. 1 — between propositions stating, or purporting to state, "matters of fact and real existence," and others stating, or purporting to state, "the relations of ideas."
16. J. R. Searle, "How to Derive *Ought* from *Is*," *Philosophical Review* 73 (1964): 43–58.
17. J. L. Austin, *Collected Papers*, 2nd ed. (Oxford: Oxford University Press, 1970), p. 182.
18. Notice here Hume's still much under-appreciated comparison between terms which can and cannot be so analyzed, in *An Inquiry concerning the Principles of Morals*, sec. 9, pt. 1.
19. Austin, *Collected Papers*, p. 185.
20. *Wall Street Journal*, October 25, 1978, editorial entitled "A Sense of Proportion." Cicero was in his day no doubt on target when he wrote: "We do not speak of justice in the cases of horses or lions" (quoted in Grotius, *Law of War and Peace*, p. 41).
21. Bentham, *Principles of Morals and Legislation*, vol. 17, *Collected Works*, p. 4n (emphasis in original). John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), p. vii–viii.
22. *General Practitioner* (London), November 26, 1976.
23. Ponder here one excellent saying of a perhaps no longer disfavored Sage. A pupil once asked Confusius whether his rule of conduct might not perhaps be epitomized in a single word: "The Master replied, 'Is not "reciprocity" the word?' " See *The Analects*, trans. and ed. W. E. Soothill (Taiyuanfu, Shansi: Soothill, 1910), bk. 15, sec. 23.
24. It is, presumably, because he is himself thinking only of welfare rights, and is either indifferent about or even hostile to liberty — or at least to liberties for enemies of socialism — that Kai Nielsen in a recent article on "Grounding Rights" makes an otherwise unintelligibly perverse remark: "I am, speaking personally, committed through and through to such a conception of the moral equality of persons. However, I differ from many . . . in believing that it requires socialist institutions for anything even approximating its implementation" (*Inquiry* 25, no. 3 [1982]: 178).
25. Herbert Hart, "Are There Any Natural Rights?" *Philosophical Review* 64, no. 2 (1955): 184.
26. This is not actually the strict truth: for when recently there were reports from the U.S.S.R. that some heroes were trying to form a genuine labor union independent of the party and the government, it proved impossible to screw out of the General Council of the TUC even the faintest murmur of sympathy or support for these Tolpuddle Martyrs of our own time.

    When later the genuine free Polish trades union Solidarnosc was being formed, a TUC official delegation was on its way to Poland, and was spared the embarrassment of visiting the Headquarters of the popularly repudiated government unions only by a last minute withdrawal of the original Communist invitation.
27. I have developed this argument in "The Right to Death," a paper first presented to a Gerontological Institute at Sangamon State University in Springfield, Illinois. It was first published in *Reason Papers*, no. 6 (Santa Barbara, Calif.: Reason Foundation, 1980), and is to be reprinted in the *Proceedings* of that Institute (New York: Human Sciences, forthcoming).
28. Immanuel Kant, *Groundwork of the Metaphysic of Morals*, in *The Moral Law*, trans. H. J. Paton (London: Hutchinson, 1948), pp. 90, 91 (italics and capitalization in original).
29. Schopenhauer, *On the Basis of Morality*, trans. E. R. J. Payne (Indianapolis, Ind.: Bobbs-Merrill, 1965), p. 95.

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The Proprietary Theory of Justice in the Libertarian Tradition

by Carl Watner
Baltimore, Maryland

The central ideas of contemporary libertarianism have taken many centuries to evolve. The single most important aspect of libertarian theory to have emerged during this time is the concept of proprietary justice. The proprietary theory of justice is concerned with just one thing: the crucial determination of just versus unjust property titles of individuals in their own bodies and in the material objects around them. The determination of property titles is highly critical because, in the deepest sense, all property is ultimately private.[1] It must ultimately be controlled or belong to some individual person or group of persons. Since individual survival is impossible without appropriation, the significant question in all social analysis is whether the actual owners, the actual users, are legitimate or criminal. The basic purposes of this paper are threefold: 1) to outline the framework of the proprietary theory of justice and show how it developed out of early natural law doctrine; 2) to describe and evaluate the contributions of such seventeenth-century thinkers as Grotius, Pufendorf, and Locke towards the development of the proprietary theory of justice; and 3) trace out the anarchistic implications of the proprietary theory of justice by examining the nineteenth-century thinking of Lysander Spooner. If these goals are met, the reader will attain some understanding of the proprietary theory of justice, of its place in the history of political thought, and of its significance and powerful import to the contemporary libertarian movement.

The proprietary theory of justice is based on two axioms which make the distinction between just and unjust property titles possible: the self-ownership and the homesteading axioms. By the self-ownership axiom, every individual has an absolute right to his or her own mind and body and the labor thereof. Each person has the right to control that mind and body free of coercive interference. People must necessarily exist in a particular place at any time, and in order to survive, they must apply their labor to the material objects around them. By the homesteading axiom, they become the rightful owners of hitherto unclaimed and untransformed natural resources. The full import of the homesteading axiom is well expressed by the phrase: "first ownership to the first user."[2] The central thrust of libertarian thinking (based on these two axioms) is to oppose any and all forms of invasion against the just property titles of individuals in their own

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persons and in the material objects they have homesteaded or voluntarily acquired from other homesteaders. The entire libertarian creed consists of the spinning out of the logical implications of these two axioms.

Individualist anarchism is the logical outcome of the proprietary theory of justice. This doctrine proclaims that all States should be abolished and that all the affairs of people should be carried out by individuals or their voluntary associations.[3] For the libertarian, crime is an act of aggression against a man's property rights, either in his own person or in his materially owned objects. The fact that criminals call themselves "government officials" makes no difference to the libertarian. Crime is crime, aggression against rights is aggression, no matter how many people are involved or what those people call themselves. The criminal metaphor, in which governments are compared to organized gangs of banditti, thieves, pirates, and highwaymen, has been the darling of libertarians throughout history, precisely because of its accuracy: government and the participants in it are the greatest criminals of all.[4] Wherever and whenever governments exist, property rights are negated.[5] All governments exhibit at least two aggressive and therefore criminal features. First, governments obtain their revenues by means of taxation, that is, by compulsory levy. Secondly, all governments presume to establish a compulsory monopoly of defense services over some geographic area. All competing agencies are outlawed and property owners have no alternative but to patronize the government system.

The natural law tradition confirms the libertarian attitude towards the inherent criminality of government. Its principal subject matter was concerned with the determination of what is one's own and what is one's due.[6] Although there were inconsistencies in early natural law thinking, the natural law tradition forms the basis for much of the proprietary theory of justice. The quintessence of natural law thinking is epitomized by Porphyr's (circa 232–304 A. D.) statement that "justice consists in the abstaining from what belongs to others, and in doing no harm to those who do no harm."[7] The Stoic maxim of according everybody his own *(suum cuique tribuere)* expressed the same basic idea. As interpreted by the early teachers of natural law, this maxim had a purely negative significance. It only said that you shall leave to each what belongs to him. The principle of right behavior was to abstain from interfering from that which belongs to another *(alieni abstinentia)*. The Stoic maxim was therefore most often expressed in the sentence that you must not harm another *(neminem laedere)*. Robbing another of something that belonged to him was to commit an injury *(iniuria)* upon him. The ancient legal maxim of the Roman jurists: to live honestly, to hurt no one, and to give to everyone his due, was an expression of the proprietary theory of justice. The natural law presupposed that everyone had a sphere of his own, which was called the *suum*, or that which belongs to the individual. An *iniuria* consisted in an attack on the life, body, property, or liberty of another person. In its essence, an *iniuria* consisted in depriving another personality of something that belonged to it *(usurpatio alieni)*.

Critics of the natural law have pointed out that while it enjoined abstinence

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from that which belongs to another, it did not define what is rightfully another's.[8] It has been argued that the principle of *suum cuique tribuere* was an empty phrase because it presupposed that the *suum* was already defined. The weakness and circularity of the natural law, in this regard, was that it only defined the *suum* as that sphere which must not be violated.[9] It did not furnish any means of positively identifying one's own, such as that provided by the self-ownership and homesteading axioms. Another problem that early natural law theorists faced was how to move from the known fact that man must produce and appropriate the fruits of his labor in order to survive to the conclusion that other men were obligated not to interfere with another's proprietorship. The basic question natural law theory had to answer in this regard was: *By having first appropriated something, how could one man impose upon others an obligation to respect his proprietorship?* Or phrased another way, these theorists wished to know *whether one man has any obligation, apart from promise or contract, to refrain from using that which has already been appropriated, but is not currently being used by its original appropriator?*[10]

In formulating answers to these questions, nearly all the natural law thinkers of the seventeenth century began with the premise that the world and all it contained was owned in common by all mankind.[11] Hugo Grotius, the earliest of the trio of seventeenth-century natural law thinkers that shall be examined here, adopted such a premise in his work on *The Law of War and Peace,* written in 1625. In Book II, Chapter II, titled "Of Things Which Belong to Men in Common," Grotius outlines his view of how private property came into existence:

> Soon after the creation of the world, and a second time after the Flood, God conferred upon the human race a general right over things of a lower nature. "All things," as Justin says, "were the common and undivided possession of all men, as if all possessed a common inheritance." In consequence, each man could at once take whatever he wished for his own needs, and could consume whatever was capable of being consumed. The enjoyment of this universal right then served the purpose of private ownership; for whatever each had thus taken for his own needs another could not take from him except by an unjust act.[12]

However, since men were not content to live in primitive communism forever, Grotius provides us with a theory of how things become subject to private ownership:

> This happened not by a mere act of will, for one could not know what things another wished to have, in order to abstain from them — and besides several might desire the same thing — but rather by a kind of agreement, either expressed, as by a division, or implied, as by occupation. In fact, as soon as community ownership was abandoned, and as yet no division had been made, it is to be supposed that all agreed, that whatever each one had taken possession of should be his property.[13]

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Although Grotius's terminology and thought were moving towards a theory of negative ownership (which Pufendorf more fully developed), his theory failed in making property a natural right, since he based private ownership on a supposititious convention subscribed to by the whole human race.[14] Starting from the basic premise that the world was owned in common, it was simply impossible to formulate a satisfactory theory of proprietary justice. Two difficulties emerged from Grotius's theory. One, which is common to all contract theories of ownership, is that men may deny that such a contract or agreement was ever made, and that even if it was, it could not obligate those who were not yet born. Secondly, if property rights were created by human authority, why could they not be abrogated by human authority, by the agreement of those who were dissatisfied with the existing distribution of property titles?

Grotius's response to these problems revealed another flaw in his theory. In common with earlier natural right theorists, he maintained that the institution of private property protected men's natural equality of rights. Instead of defining property as those material objects which each person acquired by first appropriation and first use, he emphasized that objects in the world were still owned in common even though individuals labored upon them. Hence common property could not become individual property merely because someone chose to labor on it, unless that ownership were ratified by a positive agreement.[15] In short, although Grotius uses all the familiar phrases, his theory of natural right is really no such theory at all. It derives the rights of property not from natural law, but from the agreement of men. It provides no rational explanation of why men should have subscribed to an agreement which legalized and perpetuated the unjust claims of those who had taken more than their fair share of the common property.[16]

At the same time that Grotius's ideas were gaining currency, the constitutional struggle against royal taxation was taking place in England. John Lilburne and the Leveller party helped to popularize the concepts of natural rights in mid-seventeenth-century England. The Levellers not only opposed Charles I but eventually became the opponents of Cromwell as well. Their opposition in both cases was based on their adoption of natural law theories. The Levellers insisted that by the law of nature all men were created equal and endowed with the same natural rights. From this principle they deduced that all special privileges granted by the government were usurpations. In 1647, a confrontation took place between the Levellers and the Army Grandees, which reflected the differences between themselves and Cromwell's supporters. The Putney Debates illustrated the radical nature of Leveller thought. When Henry Ireton, Cromwell's son-in-law, claimed that the Leveller party would destroy all property, they confidently appealed to the law of nature. They tried to demonstrate that the right of property is guaranteed by the law of nature, and not, as Ireton maintained, merely by positive government laws.[17] Clarke, one of the Leveller debaters, urged that the law of nature is the basis of all political constitutions. "Yet really properties are the foundations of constitutions, and not constitutions of property. For if so be there were no constitutions, yet the law of nature does give a principle for every man to have a

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property of what he has or may have which is not another man's. This natural right of property is the ground of mine and thine.''[18]

Despite their party name, the Leveller leaders disavowed any claim that their intention was to level men's estates or forcefully redistribute property from rich to poor. They all insisted that property was a natural, individual right. It was on this concept of natural right that they rested their case for individual property, civil and religious liberty, and government by consent.[19] Their fundamental position was that every man is naturally the proprietor of his own person. Richard Overton, an associate of Lilburne, clearly set forth his concept of self-ownership in his pamphlet, *An Arrow Against All Tyrants* (October 12, 1642):

> To every individual in nature is given an individual property by nature, not to be invaded or usurped by any: for every one as he is himself, so he hath a self propriety, else could he not be himself, and on this no second may presume to deprive any of, without manifest violation and affront to the very principles of nature, and of the Rules of equity and justice between man and man; mine and thine cannot be, except this be; No man hath power over my rights and liberties, and I over no man's; I may be but an Individual, enjoy myself, and my self propriety, and may write myself no more than my self, or presume any further; if I do, I am an encroacher and an invader upon an other man's Right, to which I have no Right. For by natural birth, all men are equally alike and born to like propriety, liberty, and freedom, and as we are delivered of God by the hand of nature into this world, every one with a natural, innate freedom and propriety (as it were writ in the table of every man's heart, never to be obliterated) even so as we to live, every one equally and alike to enjoy his Birth-right and privilege; even all whereof God by nature hath made him free.[20]

Despite their strongly incipient libertarianism, the Levellers had no detailed theory of the natural right of property. Consequently they were unable to rebut Ireton's contention that by natural law all was common and that private ownership was a convention based on the consent of men. Because they had no total theory of ownership to divert it, the Levellers' concept of natural right and equality flowed in a radical direction — towards levelling of men's estates. Ireton repudiated their theory of natural rights in order to safeguard the rights of property.[21] The problem was that, although they had embraced the concept of self-ownership or self-proprietorship, the Levellers were lacking a true understanding of the significance of the homesteading axiom. Without it, they were unable to determine how much each individual might take from the common stock of nature. This was a problem that had always perplexed the natural law theorists.[22]

It was left to Samuel Pufendorf, a German, to make the next important improvement in the classical theory of property in 1672. Building on Grotius's theory, Pufendorf began by making an important distinction between negative and positive community in the state of nature. ''Things in positive community 'differ from things owned, only in the respect that the latter belong to one person while the former belong to several in the same manner.' ''[23] When a thing is positively or jointly owned, any disposition of the thing without the consent of all its owners

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is a violation of their ownership rights.[24] Negative community, on the other hand, simply means that nothing belongs to anyone. Things in a state of negative community are said to belong to nobody more in a negative sense than a positive sense; that is, they are not yet assigned or owned by a particular person, not that they cannot be assigned or owned by a particular person. According to Pufendorf, it was a negative community established by the law of nature.

In Book IV of his *The Law of Nature and Nations,* Pufendorf devotes the whole of Chapter IV to "the origin of dominion." In Section 2 of that chapter, he sets forth his distinction between positive and negative community. In Section 5, he makes it clear

> that before any conventions of men existed there was a community of all things, not indeed, such as we have called positive, but a negative one, that is, all things lay open to all men, and belonged no more to one than another. But since things are of no use to men unless at least their fruits may be appropriated, and this is impossible if others as well can take what we have already by our own act selected for our uses, it follows that the first convention between men was about these very concerns, to the effect that whatever one of these things which were left open to all, and of their fruits, a man had laid his hands upon, with intent to turn it to his uses, could not be taken from him by another.[25]

In Section 10, Pufendorf analyzes the famous theater example taken from Cicero, which Grotius had touched on.[26] Grotius had written that although the theater is a public place, yet it is correct to say that the seat which each man has taken belongs to him. Pufendorf went further. Suppose a common theater is erected by the government for the use of its citizens:

> if one citizen rather than another is to secure a seat for a performance, from which he cannot be rightfully removed by another, there is need of a corporal act, that is, of his occupying the seat. Nay, more, individual citizens, with the consent of the State, can secure seats for themselves for all time. In the same way it is understood that, before the occurrence of a human act sufficient to cause dominion, anything is public property, negatively common to all, that is, belonging no more to one man than another. But when division has been made by express agreement, or occupancy has been granted by tacit agreement, the thing passes over from negative community into proprietorship.[27]

Thus the community of nature, being a negative community, allowed Pufendorf to dispense with one part of the agreement which previous natural right theorists had found necessary for the institution of private property. Since men had no joint or positive or overlapping rights in the state of nature, it was not necessary to assume that those rights must have been extinguished by universal consent, by an agreement subscribed to by all men. Pufendorf was one step nearer a theory of property which would dispense with agreement and convention altogether. His theory demonstrated that a man in the negative community of nature did not violate another man's rights when an appropriation of hitherto unused property was made. "But having first appropriated something," Pufen-

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dorf wanted to know, "how could one man impose upon the others an obligation to respect his proprietorship?" Pufendorf concluded that the first appropriator still needed to obtain the voluntary consent of all other persons to respect his property.[28]

Ultimately Pufendorf's theory of property still failed to meet the criticisms to which Grotius's theory was liable. It still based property on the "sands of human agreement instead of the rock of natural law." Critics could still deny the validity and even the existence of such an agreement.[29] However, if natural community is negative community, if in the beginning no one has a right to anything, then an agreement extinguishing rights will be unnecessary. Then the problem will be simply to show that new rights may originate naturally and that a man may acquire property rights, which of themselves obligate others to respect his proprietorship. Pufendorf did not discover the solution to this problem, although he came close to it in an incidental passage. One reason for the introduction of private property, he wrote, is that "most things require labor and cultivation by men to produce them and make them fit for use. But in such cases it was improper that a man who had contributed no labor should have the right to things equal to his by whose industry a thing had been raised or rendered fit for service."[30]

John Locke was the first to demonstrate that the laws of nature imposed an obligation on men to respect the property rights of anyone who by his own labor had appropriated things from their state of nature. He accomplished this feat in his *Two Treatises on Government* published in 1690. Locke's theory of property rights was a direct answer to the critics of Grotius and Pufendorf. The problem Locke poses to solve is to "show how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners."[31] Despite the applicability of Locke's reasoning to Pufendorf's theory, Locke in fact took two steps backward and one step forward in the advancement of proprietary justice for libertarianism.

Locke clearly began his theory of property rights with the premise that the world was given to men in common. He reasserted the Scholastic view, which Grotius had built upon, to stress the logical priority of "belonging to all in common."[32] By beginning with this approach, Locke was faced with the problem of robbery as it arises in communism. His answer was that if a man takes more than his share, it belongs to others.[33] Locke's advance in proprietary theory (his step forward) was to reject Pufendorf's claim that an agreement was necessary to institute property rights. Locke did this by redefining positive community. "Although the common belongs to everyone in the same manner, it belongs to them to use for the duty of acquiring the means necessary for support and comfort."[34] Pufendorf had posited that although things belong to no one, yet a man who wished to appropriate even an acorn would have to obtain the consent of all mankind. Locke rejected this contention as absurd, for men would be condemned to starvation had it been true.[35] Locke's two steps backwards consisted in his assumption of original communism and in the formulation of his proviso. In the context of Locke's theory, this proviso (that a man can have a right of property

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only in things "at least where there is enough, and as good left in common for others") permits him to dispense with obtaining the consent or agreement of other persons because this negates the possibility of their being harmed by another's proprietorship over the material objects of the world. The one step forward was to formulate a theory of proprietary justice which did away with the necessity for obtaining the consent of others.[36]

The problem was to show how it came to be that when one man took a portion of the "unowned" common stock, the rest of mankind was obliged to respect that portion as his private property. Pufendorf could not see how that obligation could exist unless mankind had agreed to assume it. Locke discovered that it was imposed by the law of nature, and bound all men fast long before human conventions had been thought of.[37] Said Locke:

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labor of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labor with, and joined to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, it hath by this labor something annexed to it, that excludes the common right of other Men. For this Labor being the unquestionable Property of the Laborer, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.[38]
>
> . . . It will perhaps be objected to this, That if gathering the Acorns, or other Fruits of the Earth, etc. makes a right to them, then any one may ingross as much as he will. To which I answer, Not so. The same Law of Nature, that does by this means give us Property, does also bound that Property too. . . . But how far has he given it us? To enjoy. As much as any one can make use of to any advantage of life before it spoils; so much may he by his labor fix a Property in. Whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for Man to spoil or destroy.[39]
>
> . . . As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property. He by his Labor does, as it were, inclose it from the Common. Nor will it invalidate his right to say, Every body else has an equal Title to it; and therefore he cannot appropriate, he cannot inclose, without the Consent of all his Fellow-Commoners, all Mankind. God, when he gave the World in common to all Mankind, commanded Man also to labor, and the penury of his condition required it of him. God and his Reason commanded him to subdue the Earth, i.e., improve it for the benefit of Life, and therein lay out something upon it that was his own, his labor. He that in obedience to this Command of God, subdued, tilled, and sowed any part of it, thereby annexed to it something that was his Property, which another had no Title to, nor could without injury take from him.[40]

Here in one of its earliest forms was a theory of proprietary justice. Despite Locke's problems, he clearly enunciated both the self-ownership and homesteading axioms. Locke clearly recognized that private acquisition and private ownership must be coeval with human existence. Out of a realistic consideration for the

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only way men can exist, Locke maintained that labor, and not consent, established the title to private property.[41] In defending the original right of all men to private ownership, and in elevating this right above consent, in opposition to Grotius and Pufendorf, Locke preserved the status of natural law as independent of consent. Although Locke helped to advance the proprietary theory of justice, he made a devastating concession from the homesteading axiom in the formulation of his proviso clauses. If all things on earth are common, Locke supposed, taking something for one's use would not be an injury to one's fellow man, so long as his proviso (that there was enough left for others) was satisfied.[42] The proviso placed imposing limitations on the homesteading axiom. Property acquired in the state of nature included only those things which the individual could produce by his own labor and was limited to the amount that the individual could use; and it was further limited in the case of land by the rule that the appropriator must leave enough for the requirements of others. As we have seen, Locke's major theoretical problem concerning private property arose from his assumption that the original grant of the earth was made in common to mankind.[43] In order to describe the conditions of appropriation under which no one would be injured, Locke formulated the proviso. People suffered no injury if there was as much left for them to appropriate in turn. Hence the concession from the homesteading axiom, which if not subjected to the proviso would permit unrestricted appropriation.

The Lockean proviso takes on several different forms in the *Two Treatises*. It is mentioned at least seven times in the Second Book's chapter on property (Chapter V). The proviso is often referred to as the spoilation clause because Locke wrote that "As much as any one can make use of to any advantage of life before it spoils; so much he may by his labor fix a property in it."[44] The proviso was grounded in the idea that each person in the state of nature owned an unspecified but joint share of the world. If wild fruit rotted or venison putrified before a person could consume them, "he offended against the common law of Nature, and was liable to be punished; he invaded his neighbor's share, for he had no right farther than his use called for any of them.[45] Punishment of the person who violates the spoilation clause is justified because he has invaded his neighbor's share. His offense was to misuse the provisions he had made and so invade his neighbor's portion. "The proprietor is thus punished for taking more of the common goods than he can use, even though he made those goods."[46]

The collectivist assumptions of the *Two Treatises* and the supposition that the world is owned collectively by its inhabitants are plainly seen in the formulation of the proviso.[47] Natural acquisition and homesteading are legitimate in the state of nature as long as the "enough and as good for others" proviso is satisfied. The basic premise that God gave the earth to all men in common for all time, however, invalidates all exclusive rights once the proviso is no longer met. "In a world where nearly all resources are short," Locke's homesteading theory has little application. "When the vital proviso is no longer satisfied, goods once legitimately acquired can no longer be retained in exclusive possession, but revert to common ownership."[48] Given Locke's repeated insistence on the proviso, it is a

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bit remarkable that he has been depicted as a defender of unconditional private property in land and possessions.[49] The crucial point for Locke in any distribution of property is that everyone must have the means necessary for comfortable subsistence.[50] The proviso undercuts Locke's homesteading theory and if logically applied makes it impossible for anyone to acquire ownership of anything so long as there are conditions of scarcity. Since scarcity will eventually arise and can be traced back to that first act of appropriation, therefore no appropriation whatsoever is justified.[51] Locke's proviso has been used as a justification for the claim that "the right to an equal share of the basic non-human means of production" is a natural right of all human beings and has been called the foundation for socialism.[52]

Despite Locke's one major contribution to the proprietary theory of justice, which was to show that the privatization of positive community was possible without consent, so long as the proviso held, subsequent critics have challenged him on three main grounds: 1) that his argument is self-contradictory since the proviso logically leads to the outlawry of all private property; 2) that his original assumption of positive community ownership is wrong; and 3) that he is incorrect in his position that individual appropriation worsens the conditions of those who do not possess a share of the appropriated resources. Walter Block and Israel Kirzner, both Austrian economists, have each criticized Locke on this last point. Block has argued that since no interpersonal comparisons of utility or welfare have any scientific foundation, there is no legitimate basis on which to say that anyone is worse off or harmed by private appropriation.[53] Similarly, Kirzner has refused to accede to Locke's assumption that "whenever a discoverer appropriates all of a limited deposit of resource, he is worsening the situation of others for whom the deposit was completely unknown and non-existent."[54] According to Kirzner, the homesteading axiom confers a just title on the discoverer or transformer of property, "not in the negative sense that such title involves no injustice to others, but in the positive sense that justice requires that the creator be recognized as the owner of what he has created."[55]

Another critic of the Lockean proviso is Roger Pilon, who questions: "What right of others do we violate when we acquire as much as we want?"[56] No rights were violated in the process of appropriation because "we do not have a right to the world's being the way it is at any particular time in its history."[57] The fact that appropriation benefits or worsens the conditions of non-appropriators is besides the point. Nineteenth-century English critics have pointed out that the land was made by no one and therefore belongs to no one until appropriated.[58] J. Greevz Fisher explained that in relation to land, each man must exclude all others from the spot under his feet. "Competing individuals are not responsible for the birth of others; and though sympathy may inspire generosity, there is no valid claim to sustenance conferred by birth and life alone. . . . Why should the multiplication of neighbors (causing various resources to become more scarce) vitiate the title of early comers?"[59]

Murray Rothbard has shown that Locke's proviso may lead to the outlawry

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"of *all* private ownership of land, since one can always say that the reduction of available land leaves everyone else, who could have appropriated the land, worse off. In fact, there is no way of measuring or knowing when they are worse off or not."[60] Even if there were a way of determining whether they were worse or better off, it would not matter.[61] "Everyone should have the right to appropriate as his property previously unowned land or other resources. If latecomers are worse off, well then that is their proper assumption of risk in this free and uncertain world."[62]

Finally we will examine how Lysander Spooner dealt with Locke's proviso. From his assertion that "the natural wealth of the world belongs to those who first take possession of it," Spooner deduced the rule that "each one may take enough to supply his own wants, if he can find the wherewith unappropriated."[63] Spooner showed that, since the wealth of nature is available to supply man's wants only by way of individual appropriation, man must take possession of the earth and its produce, before he can apply them to the sustenance of his body.

> He must take possession of land, and thus make it his property before he can raise a crop from it, or fit it for his residence. If the first comer have no right to take possession of the earth, or its fruits, for the supply of his wants, the second comer certainly can have no such right. The doctrine, therefore, that the first comer has no natural right to take possession of the wealth of nature, make it his property, and apply to his uses, is a doctrine that would doom the entire race to starvation, while all the wealth of nature remained unused, and unenjoyed around them.[64]

Spooner's major contributions to the proprietary theory of justice are found in his book on *The Law of Intellectual Property; Or an Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas* (1855). In order to defend the right of ownership by inventors and authors in the products of their mental labors, Spooner had to elaborate a theory of justice in the ownership of land and chattels. There is no need to go into a detailed examination of Spooner's defense of self-ownership and his opposition to slavery. He was a radical abolitionist even among the Garrisonians of his day. "That human beings are born with the inalienable quality of freedom underlies all of Spooner's arguments. For him 'it was a self-evident truth that . . . *all* men are *naturally* and rightfully free.' 'A man cannot be subject of human ownership.' 'A man cannot alienate his right to liberty and to himself, — still less can it be taken from him.' Just by being born, a man is free."[65] Spooner was a firm defender of the self-ownership axiom, as his early attacks on slavery illustrate.

As to the material objects that surround a person and the land space he or she occupies, Spooner defended unlimited private land-ownership. His proprietary theory of justice, in this case, was built upon the homesteading axiom.

> The right of property, in material wealth, is acquired, in the first instance, in one of these two ways, viz.: first, by simply taking possession of natural wealth, or the productions of nature; and, secondly, by the artificial production of other wealth. . . .

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1. The natural wealth of the world belongs to those who first take possession of it. The right of property, in any article of natural wealth, is first acquired by simply taking possession of it. . . .

There is no limit, fixed by the law of nature, to the amount of property one may acquire by simply taking possession of natural wealth, not already possessed, except the limit fixed by his power or ability to take such possession, without doing violence to the person or property of others. So much natural wealth, remaining unpossessed, as any one can take possession of first, becomes absolutely his property.*

This mode of acquiring property, by taking possession of the productions of nature, is a just mode. Nobody is wronged — that is, nobody is deprived of anything that is his own — when one man takes possession of a production of nature, which lies exposed, and unpossessed by any one. The first comer has the same right, and all the right, to take possession of it, and make it his own, that any subsequent comer can have. No subsequent comer can show any right to it, different in its nature, from that, which the first comer exercises, in taking possession. The wealth of nature, thus taken, and made property, was provided for the use of mankind. The only way, in which it can be made useful to mankind, is by their taking possession of it individually, and thus making it private property. Until it is made property, no one can have the right to apply it to the satisfaction of his own, or any other person's wants, or desires. The first comer's wants and desires are as sacred in their nature, and the presumption is that they are as necessary to be supplied, as those of the second comer will be. They, therefore, furnish to him as good an authority for taking possession of wealth of nature, as those of the second comer will furnish to him. . . .

2. The other mode, in which the right of property is acquired, is by the creation, or production, of wealth, by labor.

The wealth created by labor, is the rightful property of the creator, or producer. This proposition is so self-evident as hardly to admit of being made more clear; for if the creator, or producer, of wealth, be not its rightful proprietor, surely no one else can be; and such wealth must perish unused.

The material wealth, created by labor, is created by bestowing labor upon the productions of nature, and thus adding to their value. For example — a man bestows his labor upon a block of marble and converts it into a statue. . . . The additional value thus given to the stone . . . is a creation of new wealth by labor. And if the laborer own the stone . . . on which he bestows his labor, he is the rightful owner of the additional value which his labor gives to those articles. But if he be not the owner of the article, on which he bestows his labor, he is not the owner of the additional value he has given to them; but gives or *sells his labor* to the owner of the articles on which he labors.

* Some persons object to this principle for the reason that, as they say, a single individual might, in this way, take possession of a whole continent, if he happened to be the first discoverer . . . . But this objection arises wholly from an erroneous view of what it is to take possession of any thing. To simply stand upon a continent, and declare one's self possessor of it, is not to take possession of it. One would, in that way, take possession only of what his body actually covered. To take possession of more than this, he must bestow some valuable labor upon it, such, for example, as cutting down the

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> trees, breaking up the soil. . . . In these cases he holds the land in order to hold the labor which he has put into it or upon it.[66]

Spooner elaborated his definition of property by explaining that the principle of property is that a thing belongs to one man and not another — "Mine, and thine, and his, are the terms that convey the idea of property." The word "property" is derived from *propius,* which means "one's own." Proprietorship is the principle of one's personal ownership, control, and dominion of and over any thing. The legal idea of property is that a thing belongs to one man and another thing to another man and that neither of these persons have a right to any voice in the control or disposal of that which belongs to the other.

> The proprietor of any thing has the right to an exclusive ownership, control, and dominion, of and over the thing of which he is the proprietor. The thing belongs to him, and not to another man. He has a right, as against all other men, to control it according to his own will and pleasure; and is not accountable to others for the manner in which he may make use of it. Others have no right to take it from him, against his will; nor to exercise any authority, control, or dominion over it, without his consent; nor to impede, or obstruct him in the exercise of such dominion over it, as he chooses to exercise. It is not theirs but his. They must leave it entirely subject to his will. His will, and not their wills, must control it. The only limitation, which any or all others have a right to impose upon his use and disposal of it, is, that he shall not so use it as to invade, infringe, or impair the equal supremacy, dominion, and control of others, over what is their own. . . .
>
> This right of property, which each man has, to what is his own, is a right, not merely against any one single individual, but it is a right against all other individuals, singly and collectively. The right is equally valid, and equally strong, against the will of all other men combined, as against the will of every or any other man separately. It is a right against the whole world. The thing is his, and is not the world's. And the world must leave it alone, or it does him a wrong; commits a trespass, or a robbery, against him. If the whole world, or any one of the world, desire anything that is an individual's, they must obtain his free consent to part with it, by such inducements as they can offer him. If they can offer him no inducements, sufficient to procure his free consent to part with it, they must leave him in the quiet enjoyment of what is his own.[67]

This argument has many implications for political theory. For one thing it ultimately leads to the total rejection of all government and thoroughly demolishes the doctrine of tacit consent. William Molyneux, a friend and correspondent of John Locke, was perhaps the first to apply this strict theory of proprietary justice to the justness of governmental institutions. Writing in 1698, Molyneux was intent on proving that Ireland was not obligated by acts of Parliament in his *The Case of Ireland's Being Bound by Acts of Parliament in England, Stated.* His argument was based on past English history and Irish precedent, as well as the doctrine of natural rights: "I shall venture to assert, that the Right of being subject ONLY to such Laws, to which Men give their *own* Consent, is so *inherent* in *all* Mankind, and founded on such *immutable* Laws of Nature and Reason, that 'tis

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not to be alienated, or given up by any Body of Men whatever. . . . I have no other Notion of *Slavery;* but being bound by a Law, to which I do not consent."[68] According to Molyneux:

> The Obligation of all Laws having the same Foundation, if *One* Law may be imposed *without Consent,* any *Other* Law whatever, may be imposed on us *without our Consent.* This will naturally introduce *Taxing us without our Consent;* and this as necessarily destroys our *Property.* I have no other Notion of *Property,* but a *Power of Disposing my Goods as I please,* and not as another shall Command: Whatever another may *Rightfully* take from me *without my Consent,* I have certainly no *Property* in. To *Tax* me without Consent, is little better, if at all, than *downright Robbing me.* I am sure the Great Patriots of Liberty and Property, the Free People of *England,* cannot think of such a thing but with Abhorrence.[69]

Despite Molyneux's hopeful closing remark, we have nearly three centuries of government taxation and oppression to prove him wrong in practice. Spooner, writing a century and a half after Molyneux (and so far as we know, unaware of these earlier utterances) used the same powerful logic to formulate the doctrine of anarchistic opposition to government based on proprietary justice. Said Spooner:

> It was a principle of the Common Law, as it is of the law of nature, and of common sense, that no man can be taxed without his personal consent. . . . Taxation without consent is as plainly robbery, when enforced against one man, as when enforced against millions. . . . Taking a man's money without his consent, is also as much robbery, when it is done by millions of men, acting in concert, and calling themselves a government, as when it is done by a single individual, acting on his own responsibility, and calling himself a highwayman. Neither the numbers engaged in the act, nor the different characters they assume as a cover for the act, alter the nature of the act itself.
>
> If the government can take a man's money without his consent, there is no limit to the additional tyranny it may practise upon him; for, with his money, it can hire soldiers to stand over him, keep him in subjection, plunder him at discretion, and kill him if he resists. . . . It is therefore a first principle, a very *sine qua non* of political freedom, that a man can be taxed only by his personal consent. . . . Government have no more right, in nature or reason, to *assume* a man's consent to be protected by them, and to be taxed for that protection, when he has given no actual consent, than a fire or marine insurance company have to assume a man's consent to be protected by them, and to pay the premium, when his actual consent has never been given. To take a man's property without his consent is robbery; and to assume his consent, where no actual consent is given, makes the taking none the less robbery. If it did, the highwayman has the same right to assume a man's consent to part with his purse, that any other man, or body of men, can have. And his assumption would afford as much moral justification for his robbery as does a like assumption, on the part of the government, for taking a man's property without his consent. The government's pretence of protecting him, as an equivalent for the taxation, affords no justification.[70]

Spooner's analysis of government and taxation points up that it is impossible

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to define taxation in a way which makes it different from robbery. Taxation is theft, despite government rhetoric. Simply put, a man cannot be presumed to have parted with his property without first having given his express, personal agreement. Spooner further developed these ideas in a series of three post–Civil War pamphlets entitled *No Treason*. According to Spooner, governments and nations, if they can be said to rightfully exist at all, can exist only by consent, and this means: "*the separate, individual consent of every man who is required to contribute, either by taxation or personal service, to the support of the government. . . .* Either the separate, individual consent of every man, *who is required to aid, in any way, in supporting the government,* is necessary, or the consent of no one is necessary."[71]

In *No Treason No. II* Spooner argued that "Either 'taxation without consent is robbery,' or it is not. If it is *not,* then any number of men, who choose, may at any time associate; call themselves a government; assume absolute authority over all weaker than themselves; plunder them at will; and kill them if they resist. If, on the other hand, 'taxation without consent is robbery,' it necessarily follows that every man who has not consented to be taxed, has the same natural right to defend his property against a taxgatherer, that he has to defend it against a highwayman."[72]

In his final pamphlet of this series, *No Treason No. VI, The Constitution of No Authority,* Spooner broke new ground by thoroughly demolishing the theory of tacit consent. Spooner argued that merely living in a certain geographic place under control of a government, or voting in government elections, in no way implied one's consent to the government of that territory. Elections mean nothing; for Spooner showed that a majority of people never vote, and of those who do, the number supporting the elected candidates are so small (as a percentage of the population) as to be ludicrous. "Elections are secret; therefore, you cannot call representatives legal agents, since they do not know specifically whom they do represent." They claim to represent those that voted for them, those that voted against them, and those that never voted at all; clearly a violation of every legal principle of agency and every proviso against conflict of interest. "On the question of the Constitution itself, no vote ever had been taken, and as a legal contract the Constitution has no validity."[73] According to Spooner,

> the Constitution was never signed, nor agreed to, by anybody, as a contract, and therefore never bound anybody, and is now binding upon nobody; and is, moreover, such a one as no people can ever hereafter be expected to consent to, except as they may be forced to do so at the point of the bayonet.[74]

The proprietary theory of justice highlights the anarchistic opposition to government. To contend that government rests on the consent of the governed is to begin the descent on the slippery slope to anarchism. Historically, most political theorists have attempted to avoid the anarchistic implications of the natural rights–social contract position by resorting to the doctrine of tacit consent.[75] "It was the great achievement of the nineteenth-century anarchist Lysan-

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der Spooner to demolish the tacit consent doctrine, particularly as it applies to the U.S. Constitution. Spooner's natural rights theory, combined with his refusal to recognize the surrender of rights through tacit consent, brings out the radical anarchism latent in the Lockean tradition.''[76]

As Spooner demonstrated, it is possible to break the tacit consent doctrine only by using the proprietary theory of justice. By forcing property owners in a given geographic area (whose boundaries are considered to be coextensive with the government of the area) to support and contribute to the taxing power at all times, such property owners are denied total control over their own properties. A property owner can never withdraw his support from the state by not paying his real property taxes.[77] If he attempted to discontinue his tax payments, the state would eventually confiscate and sell his land at auction. Taxation, whether it be of land or services, or in any other form, is the equivalent of robbery, because a just proprietor is being deprived of his money or goods against his will. The fact that the government is offering goods and services in exchange for tax revenues makes no difference. Government violates the rights of self-owners when it conscripts their services in the form of personal labor or when it seizes their material wealth. It violates the right of the original landowner and his heirs or assigns when it taxes property. Finally, government denies legitimate owners and entrepreneurs the rightful use of their labor and wealth by preventing competition in the production of any goods and services which the government itself monopolizes.

In *The Law of Intellectual Property*, Spooner also developed an argument which can be used to demonstrate that government and other criminals reject the homesteading axiom and operate on the principle of communism. The advocates of any doctrine which claims that commodities are not the private property of their producers obviously destroy the homesteading axiom. Such a doctrine proclaims that at most the producer of a commodity has rights in it equal to those of men who did not produce it; he certainly has no rights in it by virtue of having produced it. ''This certainly is equivalent to denying that any exclusive right of property can be acquired by labor or production. It is equivalent to asserting that all our rights to the use of commodities depend simply upon the fact that we are men; because it asserts that all men have equal rights to use a particular commodity, no matter who may have been the producer.''[78]

> This doctrine, therefore, goes fully to the extent of denying all rights of property whatsoever, even in material things (exterior to one's person); because all rights of property in such material things have their origin in labor; (that is, either in the labor of production, or the labor of taking possession of the products of nature;) not necessarily in the labor of the present possessor; but either in his labor, or the labor of some one from whom he has, mediately or immediately, derived it, by gift, purchase, or inheritance.
>
> The doctrine of the objection, therefore, by denying that any right of property can originate in labor or production, virtually denies all rights of property whatsoever . . .; because if no rights of property in such things can be derived from labor or production, there can be no rights of property in them at all.

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> The ground on which a man is entitled to the products and acquisitions of his labor, is, that otherwise he would lose the benefit of his own labor. He is therefore entitled to hold these products and acquisitions, in order to hold the labor, or the benefit of the labor, he has expended in producing and acquiring them.[79]

In comparing the products of mental effort to the products of physical labor, Spooner pointed out that the fact that a tangible commodity may serve many people at one time (such as a road or canal or boat) without interfering with each other in their use of it, offers no justification for the rejection of the homesteading axiom by which an owner may deprive others of the use of his products, even though the owner's use is not being interfered with. If it is acknowledged that a man has an exclusive right of property in the products of his labor because they are the products of his labor, then it clearly makes no difference whether the commodity produced is in its nature capable of being possessed by many or only one person at a time. "That is a wholly immaterial matter, so far as his right of property is concerned; because his right of property is derived from his labor in producing the commodity; and not from the nature of the commodity when produced."[80] The principle of the doctrine that denies men the products of their labor is

> that all things should be free to all men, so far as they can be, without men's coming in collision with each other, in the actual possession and use of them; and, consequently, that no one person can have any rightful control over a thing, any longer than he retains it in his actual possession; that he has no right to forbid others to possess and use it, whenever they can do so without personal collision with himself; and that he has no right to demand any equivalent for such possession and use of it by others. From these propositions it would seem to follow further, that for a man to withhold the possession or use of a thing from others, for the purpose of inducing them, or making it necessary for them, to buy it, or rent it, and pay him an equivalent, is an infringement upon their rights.
>
> The principle of property is directly the reverse of this. The principle of property is, that the owner of a thing has absolute dominion over it, whether he have it in actual possession or not, and whether he himself wish to use it or not; that no one has a right to take possession of it, or use it, without his consent; and that he has a perfect right to withhold both the possession and use of it from others, from no other motive than to induce them, or make it necessary for them, to buy it, or rent it, and pay him an equivalent for it, or for its use.[81]

Again and again, Spooner reasoned that the objections to the homesteading axiom amounted to nothing more than the idea that the producer of a commodity has no right of property in it, beyond the simple right of using it himself without molestation; but that he has no right to forbid others to use it, whenever they can get possession of it and use it without collision with the original producer. This doctrine clearly implies that "men must avoid collision with each other in the possession and use of commodities."

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> This principle would not allow the producer so much even as a preference over other men, in the possession and use of a commodity, unless he preserved his first actual possession unbroken. To illustrate. If, when he was not using it, he should let go his hold of it, and thus suffer another to get possession of it, he could not reclaim it, even when he should want it for actual use. To allow him thus to demand it of another, for actual use, on the ground that he was the producer of it, would be acknowledging that labor and production did give him at least some rights to it over other men. And if it be once conceded, that labor and production do give him any rights to it, over other men, then it must be conceded, that they give him all rights to it, over other men; for if he have any rights to it, over other men, then no limit can be fixed to his rights, and they are of necessity absolute. And these absolute rights to it, as against all other men, are what constitute the right of exclusive property and dominion. *So that there is no middle ground between the principle, that labor and production give the producer no rights at all, over other men, in the commodity he produces; and the principle, that they give him absolute rights over all other men, to wit, the right of exclusive property or dominion. There is, therefore, no middle ground between absolute communism,* on the one hand, which holds that a man has a right to lay his hands on any thing, which has no other man's hands upon it, no matter who may have been the producer; *and the principle of individual property,* on the other hand, which says that each man has an absolute dominion, as against all other men, over the products and acquisitions of his own labor, whether he retain them in his actual possession, or not.[82] (Emphasis added)

Spooner's arguments present a very clear and convincing framework for maintaining the proprietary theory of justice. Within the context of libertarianism, it has already been pointed out that the self-ownership and homesteading axioms form the basis of the libertarian creed. By spinning out the logical corollaries of these axioms, the proprietary theory of justice is able to provide libertarianism with a total world view. The point I wish to make however, involves the logical reduction of any political argument to its fundamental premises. As Spooner has demonstrated, such arguments must ultimately reduce themselves to either an acceptance or rejection of the self-ownership and homesteading axioms; that is, to either individual sovereignty and the principle of private property or to slavery and absolute communism. There is no middle ground of compromise possible between these premises. The use of the proprietary theory of justice as a method of logically reducing a political argument to its basic premises permits of only two possibilities: either the rejection of its initial axioms (which forces one to accept slavery and communism) or the rejection of the logic itself by which one is forced backward to one's fundamental axioms. Thus all disputes about justice and social and political arrangements ultimately reduce themselves to disputes about self-ownership and the homesteading axioms.[83]

Later in his career, Spooner summarized the proprietary theory of justice by referring to it as the "science of mine and thine." In his 1882 pamphlet on *Natural Law, or the Science of Justice: A Treatise on Natural Law, Natural Justice, Natural Rights, Natural Liberty, and Natural Society; Showing That All Legisla-*

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tion Whatsoever Is an Absurdity, a Usurpation, and a Crime, he called proprietary justice the science of peace: "it is the science which alone can tell us on what conditions mankind can live in peace with each other." According to Spooner, these conditions are:

> first, that each man shall do towards every other, all that justice requires him to do; as, for example, that he shall pay his debts, that he shall return borrowed or stolen property to its owner, and that he shall make reparation for any injury he may have done to the person or property of another.
>
> The second condition is, that each man shall abstain from doing to another, anything which justice forbids him to do: as, for example, that he shall abstain from committing theft, robbery, arson, murder, or any other crime against the person or property of another. . . .
>
> Through all time, so far as history informs us, wherever mankind have attempted to live in peace with each other, both the natural instincts, and the collective wisdom of the human race, have acknowledged and prescribed as an indispensable condition, obedience to this one only universal obligation: viz., *that each should live honestly towards every other.*
>
> The ancient maxim makes the sum of a man's legal duty to his fellow men to be simply this: *"To live honestly, to hurt no one, to give to every one his due."*
>
> This entire maxim is really expressed in the single words, *to live honestly;* since to live honestly is to hurt no one, and give to every one his due.[84]

Based on his concept of natural law and proprietary justice, Spooner also demonstrated in this pamphlet that if there is no such thing as natural justice, then governments have no business to exist at all. Spooner argued for anarchism and the abolition of government in the following ways. First, if we admit the existence of natural law and an objective reality, there is no reason for government to monopolize the administration of justice or defense services. Because the principles of justice are grounded in objective, natural laws they fall within the province of human knowledge and are knowable by all who choose to study and reason them out. Just as we do not require a government to dictate what is right or wrong in steel making, so we do not require a government to dictate what is right or wrong in the realm of justice. If it is possible to verify objectively that one legal procedure is valid, whereas another is not, then it does not matter who employs the procedure in question. We should look to reason and fact; not to government.[85]

Secondly, if we deny the existence of natural law and objective reality, then we certainly do not require an institution such as government. What purpose could it serve? If there is no such thing as objective truth to differ about, then "there is no moral standard, and never can be any moral standard by which any controversy whatever, between two or more human beings, can be settled in any manner to be obligatory upon either." The human race must then be inevitably at war, "forever striving to plunder, enslave, and murder each other; with no instrumentalities but fraud and force to end the conflict."[86] If there is no such thing as justice, then there can be no such acts as crimes.

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In this same pamphlet on natural law, Spooner laid out his views on charity and moral duties. These views are useful in demonstrating a significant difference between his theory of proprietary justice and that of earlier thinkers. Spooner wrote that:

> Man, no doubt, owes many other moral duties to his fellow men; such as to feed the hungry, clothe the naked, shelter the homeless, care for the sick, protect the defenseless, assist the weak, and enlighten the ignorant. But these are simply moral duties, of which each man must be his own judge, in each particular case, as to whether, and how, and how far, he can, or will, perform them.[87]

He concluded that a man may be compelled to fulfill his legal duty (of living honestly towards his fellow men) but that no man may be coerced into performing acts of charity.

Spooner's distinctions between legal duty and moral duty help clarify and eventually eliminate the concept of "the right to one's due," which was a favorite expression of the very early natural law thinkers. These thinkers, especially the Stoics, used two expressions, which have been previously referred to: the right to one's due and the right to one's own. One marked actual possession (that was one's own) and the other indicated potential possession (the right to one's due).[88] The two expressions were meaningful only if based on the premise that the world was the common property of mankind. One's due, from this perspective, represented the as yet unoccupied seat in the theater (to use Grotius' and Pufendorf's example) or the as yet unclaimed inheritance of mankind. It did not represent specific property, but merely one's unspecified right of joint ownership in the things of the world. Pufendorf's rejection of the concept of positive community effectively destroyed any person's claim to common property and therefore made the expression "the right to one's due" meaningless. Since the world was actually in an unowned or ownerless state of nature, no one had a claim to anything. From that time, onwards, the right to what one had homesteaded and actually had possessed constituted the sole definition of "one's own," and stolen property, if legitimately titled, could be reclaimed by the rightful owner. In such instances, such a claim was valid only if one was claiming back what had already been one's own.

Grotius's and Locke's views on charity will help clarify these distinctions.

> Grotius' account of rights and justice leads to a revision of the nature of charity. One exception to abstaining from that which belongs to another is incorporated into the original agreement to institute private property. If a person is in dire need, he may be said to have the original use right and, therefore, use another's property. The reason is not, and cannot be, that the needy have a claim to their due. . . . "The Property of Goods is supposed to have been established with this favorable Exception, that in such cases one might enter again upon the Rights of the Primitive Community." Charity is thus a negative duty and need only be observed once the needy have proven that they are in a state of absolute necessity.[89]

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Locke, and Pufendorf, too, rejected the implication of the homesteading axiom in their theories of charity. "If first taking is the condition for the application of a right to exclude others, it follows that a person in dire need could conceivably be barred from things necessary for his preservation. But, according to Grotius, the right to use another's provisions, in the case of absolute necessity, is an exception built into the agreement to institute private property. Thus, prior to this agreement, it is possible that a man could perish as a consequence of the operation of natural rights."[90]

Locke, in accord with his proviso, looks upon charity as a natural right of mankind, a right which the owners of property are bound to respect and fulfill.

> "Charity gives every Man a Title to so much out of another's Plenty, as will keep him from extreme want, where he has no means to subsist otherwise." Where no means are available for a man to provide for himself, the right to the means of subsistence applies directly to another person's goods. "God the Lord and Father of all, has given no one of his Children such a Property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplusage of his Goods." A proprietor who has more than enough to sustain himself is under a positive duty to sustain those who do not: " 'twould always be a Sin in any man of Estate, to let his Brother perish for want of affording him Relief out of his plenty."[91]

It was Pufendorf who had actually pointed out that Grotius's theory of natural rights allowed for the needy to be excluded from the goods of the world, except that such an exception might be built into the pact instituting private property. Locke argued that charity is a natural duty which follows from the nature of property. "If a case of need arises then, 'ipso facto,' one man's individual right is overridden by another's claim, and the goods become his property. By failing to hand over the goods, the proprietor invades the share now belonging to the needy. . . . The necessary goods 'cannot justly be denied him.' "[92] The right of the needy imposes a positive duty on the property owner. "The needy like everyone else, have 'a right to live comfortably in the world.' "[93]

Spooner's theory of charity is diametrically opposed to that of Grotius and Locke. Charity for him was not a positive duty, but rather a negative one; one that could not be imposed by the needy on property owners. Proprietary justice consisted in doing no harm to others and did not imply any positive or special obligations of benevolence or charity towards others. Nothing is due to a man in strict justice but what is his own.[94] If a man has nothing he can call his own (except his body), then a man still has no claim against others unless they voluntarily agree to supply him with goods. For the libertarian, justice can only be negative, can only prohibit aggressive and criminal acts by one person upon another. Justice does not compel positive acts regardless of how praiseworthy or even necessary such actions may be. In the libertarian scheme of things, "there are no general positive obligations, obligations to do something for another as opposed to refraining from doing something to him. Positive obligations arise only from an individual's own actions, such as entering into a contract; the

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unfortunate straits of another cannot create them.''[95] If the self-ownership and homesteading axioms are to apply equally to each and every person, then it is impossible that one's need (or greed or wealth) could serve as a justification for the infringement on another's person or property.

Several contemporary thinkers have realized that the self-ownership axiom means only the right not to be killed or let die unjustly, not the right to receive or acquire the means of survival. Under the self-ownership axiom a person literally has no claim whatsoever on the lives of others. To understand this right not to be killed or let die unjustly, consider the following example.

> Tom, Dick, and Gertrude are adrift on a lifeboat. Dick managed to bring aboard provisions that are just sufficient for his own survival. Gertrude managed to do the same. But Tom brought no provisions at all. So Gertrude, who is by far the strongest, is faced with a choice. She can either kill Dick to provide Tom with the provisions he needs or she can refrain from killing Dick, thus letting Tom die.[96]

Killing Dick would be unjust for several reasons, but most of all because he was a non-aggressor and a self-owner. Letting Tom die would not be unjust (*i.e.*, it would be just) because it would be the only way of respecting the self-ownership rights of all three. Obviously Gertrude's non-action (her failure to initiate aggression against Dick in order to give provisions to Tom) might result indirectly in the death of Tom. However, her responsibility in the event of Tom's death would be quite distinct from her responsibility in the event of Dick's death. In the one case, nature would take its toll and Tom would die from starvation; whereas the death of Dick would be caused by Gertrude's direct acts of violence against him. The obvious libertarian solution to this dilemma would be for Gertrude to exercise her own rights of self-ownership and homesteading and distribute some of *her own* provisions to keep Tom from starving. Of course she is under no more obligation to Tom than Dick would be. We may consider it to be her moral duty to assist Tom, but it is not her legal duty. The most she could do would be to share her own provisions with Tom and try to persuade Dick to voluntarily do the same.

Situations may arise in which some persons do not have property rights to goods that are necessary to meet their basic needs, while others have property rights to more than enough goods to meet their needs. Under this view of proprietary justice, if persons with property rights to surplus goods chose not to share their surplus with anyone else, they would not be violating anyone's right to self-ownership or homesteading, ''for although, by their decision not to share, they would be killing or letting die those who lack the means of survival, they would not be doing so unjustly, they would not be depriving anyone of his property.''[97] As Judith Jarvis Thomson has said, ''having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body'' or property ''even if one needs it for life itself.''[98] To repeat: self-ownership rights mean ''not the right not to be killed, but rather the right not to be killed unjustly.''[99] As we have seen in the case of Tom, Dick, and Gertrude, we must treat all other human beings with absolute respect

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for their self-ownership rights. "You own yourself. . . . Other people own themselves. . . . You literally have no claim whatsoever on the lives of others. You can only relate to them when, where, and how they want you to; otherwise, you must let them be. You must treat them with respect for their self-ownership or not at all."[100]

The notion that the world is owned equally by mankind is integrally related to the view that each and every person has a right to the means of subsistence and that wealth is a limited quantity of goods to be transferred from rich to poor. If some do not have enough, it is because others have too much. What adherents of this view do not understand is that "wealth can be created." "It is created by the application of human muscle and brain."[101] From the view that everyone has a right to survival at any cost follows the question: At whose expense? Of course, the only answer is: At the expense of those who have created wealth by the application of their human muscle and brain; *i.e.*, at the expense of the original homesteaders and their heirs and assigns. Even if the world were jointly owned by mankind at large, nature provides the individual person with practically nothing to sustain his survival.[102] In order to survive one must produce; one must apply one's labor to the material objects of the world. To say that those in need have the right to appropriate the surplus goods of others is to imply that they have the right to confiscate the labor of those who have produced the goods. To take from the storehouse of nature never has been, is not now, and never can be, in the nature of things, classed as stealing. "The essence of stealing is the taking of things which belong to others." It is simply a fact of man's nature that if he does not exert himself he will die. His exertions can be directed either against nature or against other men. Men and women have been appropriating matter and the forces of nature from the earliest times to the present on the simple but practicable theory that anyone may appropriate anything so long as he does not thereby rob other people (that is, so long as he does not appropriate anything which has already been homesteaded by another person). It is not stealing to appropriate hitherto unhomesteaded property from the state of nature; but it is stealing to exert oneself against other men and confiscate the produce of their labor. Without appropriation by the original homesteaders there would have been no property — and consequently, no robbery.[103]

Thus concludes our survey of the history and theory of proprietary justice. The proprietary theory of justice furnishes the basis for a moral rationalism — a moral theory that insists that institutions, as well as individuals, are subject to scrutiny regardless of their longevity or "official" status. It provides for the rational dignity of the individual human being: each person is a self-owner with inalienable rights of control over his or her own body and efforts. No one has any claims upon another; nor do others have any claims against you. By permitting the individual to stand alone, outside the social or political bodies of mankind, it provides the only basis on which the individual may rightfully criticize in both word and deed every other individual and existent social institution. For these reasons the proprietary theory of justice stands at the apex of libertarian thought.

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NOTES

1. Murray N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, N. J.: Humanities Press, 1982), pp. 54–55.
2. Murray N. Rothbard, *Man, Economy, and State* (Princeton, N. J.: C. Van Nostrand, 1962), 1:151. Also refer to Rothbard, *For A New Liberty* (New York: Collier Books, 1978), chap. 2, "Property and Exchange," for an extended discussion of the self-ownership and homesteading axioms.
3. Benjamin Tucker, *Instead of A Book* (1893; New York: Haskell House, 1969), p. 9.
4. See Carl Watner, "The 'Criminal' Metaphor in the Libertarian Tradition," *Journal of Libertarian Studies* 5, no. 3 (Summer 1981): 313–25.
5. Leonard Liggio, "Native American Property Rights," *Libertarian Forum*, January 1971, p. 4.
6. This paragraph draws largely on two articles, both by Karl Olivecrona: "Appropriation in the State of Nature: Locke on the Origins of Property," *Journal of the History of Ideas* 35 (April-June 1974): 211–30; and "Locke's Theory of Appropriation," *Philosophical Quarterly* 24 (July 1974): 220–34, esp. 222–23.
7. Porphyr, *On Abstaining from Animal Food*, bk. 3, chap. 3, sec. 26, quoted in Hugo Grotius, *The Law of War and Peace*, trans. Francis W. Kelsey (Oxford: Clarendon Press, 1925), "Prolegomena," p. 12, n. 3.
8. James Tully, *A Discourse on Property* (Cambridge: Cambridge University Press, 1980), pp. 82, 115.
9. Karl Olivecrona, "The Term 'Property' in Locke's *Two Treaties of Government*," *Archives for Philosophy of Law and Social Philosophy* 51 (1975): 112.
10. For the basic formulation of these questions see Richard Schlatter, *Private Property: The History of an Idea* (London: George Allen & Unwin, 1951), p. 147.
11. The claim that the world is owned in common by all mankind is both a logical and a methodological fallacy. Ownership means use and control by the individual. If the right of disownership cannot be exercised, if one cannot sell one's share or interest in that which is owned, then ownership does not really exist at all. Joint or common ownership can only be brought about by voluntary pooling of individual titles. It is simply exercising the fallacy of the stolen concept to advocate common ownership and at the same time deny the right of individual ownership to individual parts of the world. According to methodological individualism, a group cannot exercise any rights, except those already possessed by its individual members.

    The advocates of world communism, by claiming ownership of the world, have already implicitly acknowledged the case for individual ownership. The moment they concede ownership of the earth to the inhabitants of the earth, as opposed to ownership of the universe to the inhabitants of the universe, they are admitting the right of secession. If the inhabitants of the world may secede from the universe, why not the inhabitants of North America from the world? And if North Americans may secede, why not inhabitants of the United States, New York, or Manhattan? Each neighborhood? Each block? Each house? Each person? The right of secession for groups of people logically ends by recognizing the right of secession for the individual and his property. If each person may secede then we have arrived at individualist-anarchism based upon self-ownership and homesteading rights. (Arguments used here were suggested by Murray N. Rothbard, *Power and Market* [Menlo Park, Calif.: Institute for Humane Studies, 1970], pp. 3, 139.)

    There are many further problems associated with the formulation of the claim of common ownership of the world. How is it to be exercised? By whom is it to be exercised? At what age is it to be exercised? Is unanimous consent necessary, and if not, why not? And what effect do newcomers and future generations have on the exercise of the common right? Even if the concept were not a logical fallacy, the inherent inefficiency and impracticality would nullify the concept in actual use. (Also see the discussions of landownership by Auberon Herbert in *Symposium on the Land Question*, ed. J. H. Levy [London: T. Fisher Unwin, 1890], pp. 1–7, 68–79; and Rothbard, *For A New Liberty*, esp. pp. 34–35.)
12. Grotius, *Law of War and Peace*, vol. 2, bk. 2, chap. 2, sec. 1, p. 186.
13. *Ibid.*, vol. 2, bk. 2, chap. 2, sec. 5, pp. 189–90.
14. For the claim that Grotius developed a theory of negative ownership, rather than positing an

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original world communism, see Tully, *Discourse on Property*, pp. 69–71. My argument rests on my own reading of Grotius. See also Schlatter, *Private Property*, pp. 126–131, esp. pp. 129–30.

15. Schlatter, *Private Property*, p. 130. Nozick develops a similar argument in examining "Locke's Theory of Acquisition." He asks, "Why does mixing one's labor with something make one the owner of it? . . . But why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't?" (Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 174–75). This is a classic example examined by many natural law thinkers, including Grotius and Pufendorf. The essential question boils down to "who owns the property I am mixing my labor with?" To assume it is ownerless grants validity to the homesteading axiom; for to mix one's labor with an ownerless thing and still have that thing remain ownerless is absurd. To assume that the property I mix my labor with is owned in common by all mankind is to encounter the problems presented here in note 11.
16. This echoes Schlatter, *Private Property*, p. 131.
17. See A. S. P. Woodhouse, ed., *Puritanism and Liberty: Being the Army Debates (1647–1649), from the Clarke Manuscripts* (Chicago: Universityo f Chicago Press, 1951), "Introduction," p. 91.
18. *Ibid.*, "The Putney Debates," p. 75. This also reflects Clarence Carson's statement that "Property is antecedent to government, having a factual basis in production and possession" ("The Cold War," *The Freeman* 29 [March 1979]: 148). Clarke also uses traditional natural law concepts: "Yet the law of nature does give a principle for every man to have a property of what he has or may have which is not another man's" (Woodhouse, *Puritanism and Liberty*, p. 75).
19. C. B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford: Clarendon Press, 1962), p. 139. It is interesting to note the conjunction of "property as a natural right" and "government by consent" in this early setting. As we shall see, it was not until 1698 that a direct connection was made between these two concepts. However, the Levellers' agitation and opposition to both Charles I and Cromwell foretell the anarchistic implications of government by consent and respect for property rights.
20. Richard Overton, *An Arrow Against All Tyrants*, pp. 3–4, quoted in Macpherson, *Political Theory*, pp. 140–41.
21. I follow Schlatter in interpreting the Levellers. See Schlatter, *Private Property*, pp. 137–38.
22. *Ibid.*, pp. 139, 144.
23. *Ibid.*, p. 145, quoted from Samuel Pufendorf, *The Law of Nature and Nations*, trans. C. H. and W. A. Oldfather (Oxford: Clarendon Press, 1934), bk. 4, chap. 4, sec. 2, pp. 532–33.
24. Lawrence Becker, *Property Rights* (Boston: Routledge & Kegan Paul, 1977), p. 25.
25. Pufendorf, *Law of Nature and Nations*, bk. 4, chap. 4, sec. 5, p. 537.
26. Grotius, *Law of War and Peace*, vol. 2, bk. 2, chap. 2, sec. 1, p. 186.
27. Pufendorf, *Law of Nature and Nations*, bk. 4, chap. 4, sec. 10, p. 548.
28. Schlatter, *Private Property*, p. 147.
29. *Ibid.*, p. 148.
30. Pufendorf, *Law of Nature and Nations*, bk. 4, chap. 4, sec. 6, pp. 539–40, quoted in Schlatter, *Private Property*, pp. 149–50.
31. John Locke, *Two Treatises of Government*, ed. Peter Laslett, (Cambridge: Cambridge University Press, 1960), chap. 2, sec. 25, p. 304. See all of chap. 5, "Of Property." Also quoted in Schlatter, *Private Property*, p. 153.
32. See Locke, *Two Treatises*, chap. 2, sec. 26, p. 304; and Tully, *Discourse on Property*, pp. 126–27.
33. Locke, *Two Treatises*, chap. 2, sec. 31, p. 308.
34. Tully, *Discourse on Property*, p. 127.
35. Locke, *Two Treatises*, chap. 2, sec. 28, p. 306. Also see Olivecrona, "Locke's Theory of Appropriation," p. 227.
36. For the quote in the previous sentence see Locke, *Two Treatises*, chap. 2, sec. 27, p. 306. As we shall see, the pure libertarian theory of proprietary justice posits an ownerless world, a negative community, in which there is no need for homesteaders to obtain the consent of other men to their proprietorship. Precisely because men have no inherent vested interest in or ownership claim to the world around them, they are not harmed by another's appropriation of resources, even if there is not as much left or as good left for others to appropriate.
37. Schlatter and Tully disagree on the import and basis of Locke's theory. The formulation of this paragraph is based on Schlatter, *Private Property*, p. 154. Tully would disagree with Schlatter's

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claims (*ibid.*, p. 153) that Locke followed Pufendorf in assuming "negative rather than a positive community of ownership." Based on my own reading of Locke, I think he rejected negative community and started out from positive community.

38. Locke, *Two Treatises*, chap. 2, sec. 27, pp. 305–306.
39. *Ibid.*, chap. 2, sec. 31, p. 308.
40. *Ibid.*, chap. 2, sec. 32, pp. 308–309.
41. M. Seliger, *The Liberal Politics of John Locke* (London: George Allen & Unwin, 1968), pp. 191, 194, 197.
42. Olivecrona, "Appropriation in the State of Nature," p. 227.
43. *Ibid.*, p. 221.
44. Locke, *Two Treatises*, chap. 2, sec. 31, p. 308.
45. *Ibid.*, chap. 2, sec. 37, p. 313.
46. Tully, *Discourse on Property*, p. 123.
47. Willmoore Kendall, *John Locke and the Doctrine of Majority Rule* (Urbana, Ill.: University of Illinois Press, 1941), p. 72.
48. J. L. Mackie, *Ethics* (Middlesex: Penguin Books, 1972), p. 176. Also quoted in Tully, *Discourse on Property*, p. 165.
49. Tully, *Discourse on Property*, p. 170.
50. *Ibid.*, p. 169.
51. Richard A. Epstein, "Possession as the Root of Title," *Georgia Law Review* 13 (Summer 1979): 1228.
52. Hillel Steiner, "The Natural Right to the Means of Production," *Philosophical Quarterly* 27 (January 1977): 49. Also see Becker, *Property Rights*, p. 43.
53. Walter Block, *Defending the Undefendable* (New York: Fleet Press, 1976), pp. 148–53.
54. Israel Kirzner, *Perception, Opportunity and Profit* (Chicago: University of Chicago Press, 1979), p. 220.
55. *Ibid.*, p. 222.
56. Roger Pilon, "Corporations and Rights," *Georgia Law Review* 13 (Summer 1979): 1282.
57. *Ibid.*, p. 1283.
58. J. C. Spence, *Property in Land* (London: Liberty and Property Defense League, 1897), p. 6.
59. Sir Roland K. Wilson, J. H. Levy, *et al.*, *Individualism and the Land Question: A Discussion* (London: Personal Rights Association, 1892), p. 60. Fisher added that "Individualists must surrender their case by claiming that there is any sort of wealth which must be owned by society as a whole."
60. Rothbard, *Ethics of Liberty*, p. 240.
61. Locke, Spooner, and other theorists have argued that individual appropriation makes the non-appropriator better off, but this is no more justification for private property than the argument that people are made worse off by the denial of private property.
62. Rothbard, *Ethics of Liberty*, p. 240. Nozick claims in this regard: "If my appropriating all of a certain substance violates the Lockean proviso, then so does my appropriating some and purchasing all the rest from others who obtained it without otherwise violating the Lockean proviso" (Nozick, *Anarchy, State, and Utopia*, p. 179).
63. Lysander Spooner, *The Law of Intellectual Property* (Boston: Bela Marsh, 1855), pp. 21, 23. (Spooner's use of italics has not been duplicated in the quotes.) Although not mentioned explicitly in the text of the paper it is obvious that Spooner rejected the premise of common ownership held by Grotius and Locke.
64. *Ibid.*, pp. 24–25.
65. *The Collected Works of Lysander Spooner*, Biography and Introduction by Charles Shively (Weston: M & S Press, 1971), "Biography," 1:34–35.
66. Spooner, *Law of Intellectual Property*, pp. 21–25.
67. *Ibid.*, pp. 16–17.
68. William Molyneux, *The Case of Ireland's Being Bound by Acts of Parliament in England, Stated* (Dublin: Rider and Harbin, 1725), pp. 113, 169.
69. *Ibid.*, p. 170.
70. Lysander Spooner, *An Essay on Trial by Jury* (1852), in *The Collected Works*, 2:222–23.
71. Spooner, *No Treason No. 1*, (1867), in *ibid.*, 1:10–11.

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72. Spooner, *No Treason No. 2*, (1867), in *ibid.*, 1:13.
73. Charles Shively, "Introduction," to Lysander Spooner, *No Treason No. 6, The Constitution of No Authority*, (1870) in *ibid.*, 1:3.
74. Spooner, *No Treason No. 6*, in *ibid.*, 1:59.
75. This point was made to me by George H. Smith who referred to Josiah Tucker, *A Treatise on Civil Government* (London: T. Cadell, 1781). Tucker was one of the earliest critics to see the anarchistic implications of Molyneux, Locke, and the American rebels. See Tucker, *A Treatise*, pp. 12–13.
76. George H. Smith, "William Wollaston on Property Rights," *Journal of Libertarian Studies* 2, no. 3 (Fall 1978): 224.
77. Jonathan Hughes, *The Governmental Habit* (New York: Basic Books, 1978), pp. 232–33. Hughes adds with regard to property taxes: "this form of coercion is a product of history; it is not a system established by modern Americans as a matter of free choice on the basis of logic" (p. 233).
78. Spooner, *Law of Intellectual Property*, p. 76.
79. *Ibid.*, pp. 76–77.
80. *Ibid.*, p. 79.
81. *Ibid.*, p. 80.
82. *Ibid.*, pp. 87–88.
83. A contemporary Marxist has come to this same realization, although he is willing to dismiss the homesteading axiom in favor of the principle of communism. See G. A. Cohen, "Freedom, Justice, and Capitalism," *New Left Review* 126 (March-April 1981): 3–16. Cohen writes: "The key question, then, is whether capitalist private property is morally defensible. Now every piece of private property, large or small, either is or is made of something which was once the property of no one. If, then, someone claims a right to hold a certain piece of private property he has, then we must ask, apart from how he in particular got it, how the thing came to be (anyone's) private property in the first place, and examine the justice of that transformation. I believe that we shall find that the original transformation is unjust, that . . . property is theft, theft of what morally speaking belongs to us all in common" (p. 15).
84. Spooner, *Natural Law* (1882), in *The Collected Works* 1:5–6.
85. See R. A. Childs, "Objectivism and the State," *Rational Individualist* 1 (August 1969): 4–12; and George H. Smith, "Justice Entrepreneurship in a Free Market," *Journal of Libertarian Studies* 3, no. 4 (Winter 1979):405–26.
86. Spooner, *Natural Law*. See Section 13 of the version published in *Libertarian Forum*, September 1974, which differs slightly from that of *The Collected Works*.
87. *Ibid.*, in *The Collected Works*, 1:6.
88. Tully, *Discourse on Property*, pp. 67, 77.
89. *Ibid.*, pp. 84–85. Tully quotes from Grotius, *Law of War and Peace*, vol. 2, bk. 2, chap. 4, sec. 2, p. 193.
90. Tully, *Discourse on Property*, p. 87. Tully adds: "This contradicts natural law, which enjoins preservation. . . . " This is probably one reason why Locke found it necessary to formulate his proviso.
91. *Ibid.*, pp. 131–32. Tully quotes from Locke, *Two Treatises*, chap. 1, sec. 42, p. 188.
92. *Ibid.*, p. 132. Tully quotes from Locke, *Two Treatises*, chap. 2, sec. 37, pp. 312–13, and chap. 1, sec. 42, p. 188.
93. *Ibid.* Tully quotes from Lady Masham, cited in Maurice Cranston, *John Locke: A Biography* (London: Longmans Green & Co., 1957), p. 426.
94. Carl Watner, *Towards a Proprietary Theory of Justice* (Baltimore: by the author, 1976), pp. 16–17.
95. Davis E. Keeler, "Bearing Witness: Should You Be Forced?" *Reason*, February 1981, p. 42.
96. James P. Sterba, *The Demands of Justice* (Notre Dame: Notre Dame University Press, 1980), p.134.
97. *Ibid.*, p. 135. Failure to share would not be a direct killing in any case and could never be interpreted as such. Discussing the "right to life," Walter Block writes: "There are rights to liberty and to the pursuit of happiness, but there is no right to life itself. A Robinson Crusoe who has the misfortune of being shipwrecked alone on a desert island and starves to death there has not had any of his rights violated. He had no right to life in the first place. . . . We must always

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distinguish between the means to live or to live well . . . and not being intefered with in one's attempt to live well'' (Walter Block, ''Woman and Fetus,'' *Reason*, April 1978, p. 24).

98. Judith Jarvis Thomson, ''A Defense of Abortion,'' *Philosophy and Public Affairs* 1 (Fall 1971): 56.
99. *Ibid.*, p. 57.
100. Peter Breggin, *The Psychology of Freedom* (Buffalo: Prometheus Books, 1980), pp. 237, 239.
101. ''Liberty and Bread,'' lead editorial on the ''Review and Outlook'' page of *The Wall Street Journal*, March 3, 1981, p. 30.
102. As argued here in note 11, the formula ''owned by mankind at large'' is meaningless and illogical and gives no basis for individual appropriation, which is necessary to sustain all life.
103. James Carmichael Spence, *The Conscience of the King* (London: Swan Sonnenschein & Co., 1899), pp. 86–89. Ayn Rand has made the point, brilliantly, in several places, that but for production there could be no parasitism or robbery.

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Fishkin on Nozick's Absolute Rights

by Tibor Machan

Franklin College, Lugano, Switzerland
Reason Foundation, Santa Barbara

In his recent work, *Tyranny and Legitimacy*,[1] James Fishkin advances an argument against Robert Nozick's theory of, what Fishkin calls, "absolute rights"[2] by trying to demonstrate that such a theory would legitimate tyranny. Very early in the work Fishkin presents the following line of reasoning to accomplish his aim:

Fishkin asks us to imagine that "the Asians [of Idi Amin's Uganda] are not the richest, but rather, the poorest minority."[3] He continues:

> And suppose further that there is a temporary food shortage that threatens the poorest sections of the country with starvation. And let us imagine that even though food has been stockpiled for just such an emergency, the government — perhaps in realizing that it is only the Asians who would be saved from starvation — does nothing.[4]

According to Fishkin, "Nozick's theory of absolute rights could be invoked by the government to legitimate such a policy of inaction."[5] This, Fishkin maintains, stems from the fact that "Nozick's theory provides only one basis for evaluating a policy: Does it violate rights?"[6]

Fishkin finds this intolerable. He explains his grounds for this view by noting that "the crucial fact about an absolute rights theory such as Nozick's is that moral prescriptions follow *only* from rights violations."[7] While Fishkin says that this approach lends to Nozick's theory a "simplicity that provides [it] with much of its appeal," he maintains, also, that this feature of the position Nozick advances "renders it indifferent between alternatives that all avoid violating rights. According to this kind of theory, all such alternatives must be equally good."[8] To clarify the point further, Fishkin asks us to "compare two alternatives in this case: (a) the policy of saving the Asians from starvation, and (b) the policy of doing nothing. Neither of these policies violates rights in Nozick's sense. There would be no moral issue — in terms of the absolute rights theory — in choosing (b) rather than (a) — even though the Asians would starve, needlessly, if (b) were chosen. On Nozick's theory, we could not be wrong if we chose (b) rather than (a). One must be fully as good as the other. The starvation of the Asians — as long as it does not result from a rights violation — counts for nothing. It is such tyranny — through omission — that would be legitimated by Nozick's theory."[9]

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Now that we have Fishkin's argument before us in considerable detail, it is important to notice what is wrong with it because the temptation to reach this conclusion is great among contemporary political theorists.

First of all, by Nozick's theory it would not be possible for any government to engage in stockpiling food other than for purposes clearly related to governmental operations — e.g., for feeding the police or the military in emergency situations. When Fishkin says that we should imagine that "food has been stockpiled for just such an emergency," he introduces a feature into the situation which in terms of Nozick's theory could not be present. Moreover, Fishkin is seriously imprecise when he uses the passive voice. Such passive voice leaves it entirely open who stockpiled the food — e.g., the government, or some people in the country, or the Asians. Had Fishkin said that the government had expropriated the food for an emergency, it would have been clear from the start that the situation violates the Nozickian framework. Had he said that citizens have stockpiled the food for such emergencies, Fishkin could not have maintained later that "a [state] policy of saving the Asians from starvation" would be one that does not "violate rights in Nozick's sense." By simply positing the unexplained presence of stockpiled food, available for the government to distribute, Fishkin leaves his case completely unmanageable from the Nozickian framework. Alternatively, to add a point which may not be clearly implicit in Nozick's own position, if some sort of stockpile exists in the affected region without any violation of rights, there would be no objection from Nozick's framework to giving it away to those who are starving, since doing so would not violate anyone's rights.

To this last point Fishkin's following contention applies. He says that from Nozick's framework "[(a) or (b)] must be fully as good as the other . . . [because] all such alternatives must be equally good." Yet is this so?

Actually it is here that we can observe the most important flaw in Fishkin's argument. He simply conflates the moral and political dimensions. Nozick, however, makes clear in his book that he is avoiding the moral sphere and will focus only on the political. Thus, while from within Nozick's political framework (a) and (b) are politically neutral, it is clearly false that they "must be equally good."

If, for example, based on a political framework an advocate of freedom of the press and an advocate of censorship are both provided with governmental protection against physical coercion, this does not imply that both advocacies are taken as equally good from the moral point of view. It may well be true that no one should advocate censorship, yet it is also possible that those who do so should be given protection of the law, equal to that given those who advocate freedom of speech.

Nozick leaves the moral question entirely open for one who wishes to commend the advocate of free speech and denounce the advocate of censorship. Similarly, in a country experiencing famine those who share their stockpiled food could be morally commended while those who do nothing could be morally condemned. If the government came into possession of such food without the

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violation of anyone's rights — e.g., by finding food growing on some military base — the extra-political actions of the government officials concerning the food would be open to moral appraisal. There is nothing in Nozick's theory that precludes government's giving the food to those who are starving. And there is nothing in his position that requires moral neutrality between giving the food away and doing nothing, either by government or by anyone else.

Fishkin might reply by noting that Nozick has not provided us with a moral framework by which to evaluate such conduct. This is true, except for a somewhat general reference to the morality of "a person's shaping his life in accordance with some overall plan," or "of giving meaning to his life."[10] Nozick does not carry this discussion very far and tells us, in the end: "I hope to grapple with these and related issues on another occasion."[11] But this is very far from holding that all alternatives available to a person, including those of helping and of not helping starving people when no rights violation is involved, "must be equally good." The "must" here is entirely gratuitous. Given Nozick's admission that his position has thus far omitted a moral framework and that this omission is serious, to be "grappled with . . . on another occasion," Fishkin's failure to acknowledge that Nozick's view, while silent, is not necessarily indifferent on the moral quality of various courses of conduct, is a serious defect in his discussion of Nozick.

Let me briefly suggest, in conclusion, a way in which Nozick's absolute rights theory can fully accommodate the problem Fishkin poses.[12]

While the Nozickian theory of absolute rights does not authorize government to engage in forcible redistribution of goods and services, it is possible for such a theory to rest on a more fundamental ethical framework which would provide standards for distinguishing between various courses of human conduct, including such as might be open to a person who has stockpiled food available to give or not to give to starving people. Based on that ethical, as distinct from political, framework, it would be clearly false that every course of conduct "must be equally good" and true that some (type of) conduct would be better, morally more appropriate, than another. For instance, if we agree with Locke, as Nozick appears to suggest we at least might, that natural rights are based on the view that there is a law of nature that governs the state of nature, and if that law of nature requires that each person pursue his or her happiness in life, then whatever course of conduct would constitute such pursuit would be morally warranted. Since this moral framework supports natural rights theory, allegedly, it is clear that any conduct that violates natural rights could not be justified by it. But some conduct that does not violate natural rights might also be condemned by it, including the failure to act compassionately, generously, when this is what the pursuit of one's happiness — i.e., the happiness of a human being,[13] after all — would require.

It seems clear, then, that Fishkin misreads Nozick quite drastically. Moreover, he adds to this error by failing to consider that the normative dimension of human life is capable of being divided into distinctive regions, e.g., the ethical (wherein we ask and try to answer "How should I, a human being, conduct myself?"), the social (concerning "How should I act toward the variety of human

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beings near me, e.g., parents, children, friends, colleagues, neighbors, etc.?''), and the political (pertaining to ''How are we, human beings, to conduct ourselves toward each other simply in virtue of being human beings within each other's community?''). Whether so construing the situation in the normative sphere is ultimately sound is a very important issue, but it would not be possible to tackle it in this brief discussion.[14]

NOTES

1. James S. Fishkin, *Tyranny and Legitimacy* (Baltimore, Md.: Johns Hopkins University Press, 1979).
2. *Ibid.*, p. 6.
3. *Ibid.*
4. *Ibid.*
5. *Ibid.*
6. *Ibid.*, pp. 6–7. Notice, no mention is made of *whose* policy!
7. *Ibid.*, p. 7. This point is crucial. For Fishkin: politics = morality.
8. *Ibid.*
9. *Ibid.*
10. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 50.
11. *Ibid.*, p. 51. Nozick's *Philosophical Explanations* (Cambridge: Harvard University Press, 1981) would be the result of these grapplings, we may assume.
12. I have developed this approach somewhat more fully in an earlier paper. See my ''Prima Facie versus Natural (human) Rights,'' *Journal of Value Inquiry* 10 (Summer 1976): 119–31.
13. For a discussion of why, when we are considering the pursuit of happiness by a human being, we can accept that such a pursuit would never conflict with the respect for the rights of other human beings, see my *Human Rights and Human Liberties* (Chicago: Nelson-Hall, 1975), pp. 74–75. I should note that although in normal situations no conflict between the pursuit of human happiness and the respect for the rights of others need arise, in some cases a conflict might arise. But when this occurs, it is possible to retain the integrity of a system by denying that there is any need for abandoning the appropriate political framework, even while it would be appropriate to counsel the moral propriety of acting against or in breach of that framework. For a discussion of such emergency situations see my ''Prima Facie versus Natural (human) Rights''; and two papers by Eric Mack, ''Egoism and Rights,'' *The Personalist* 54 (Winter 1973): 5–33, and ''Egoism and Rights Revisited,'' *The Personalist* 58 (July 1977): 282–88. Fishkin's work is marred, additionally, by his conceptualization of the normative sphere along what could be called geometrical lines, so that unless some mathematically inflexible relationship may be identified to hold between the various areas of a normative framework, it must be considered inadequate. There is no room in such a conception of normative adequacy for emergency provisions such as judicial discretion.
14. I have been helped in considering the issues in this note by several discussions I have had on these and related topics with Rolf Sartorius and Eric Mack, though they are not responsible for anything in this paper. I wish to thank the Reason Foundation for enabling me to work on this paper.

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Religion, Morality, and American Politics*

by Richard Jensen

Department of History, University of Illinois, Chicago

Although historians had long missed the importance of religion in American politics, it has recently become a central topic. My focus will be on the late-nineteenth century, with particular concern for why voting and party affiliation were highly correlated with religious preferences. I will attempt to broaden the standard argument to include not merely denominational preferences but also moral or ethical views.

The ethnocultural model asserts that the deep party loyalty that characterized voters in the nineteenth century was grounded largely — though not exclusively — on religion, or more exactly, the combination of ethnicity and religion.[1] There were three ways in which ethnoreligious factors operated: through group solidarity, religious organization, and modes of moral reasoning.

First, many groups — such as Irish Catholics, northern Methodists, and Swedish Lutherans — formed relatively tight communal identifications, or *Gemeinschaft*. A large portion of routine interaction, such as friendships, business dealings, political conversations, and marriage were typically conducted within the group.[2] In many rural areas, and in some city neighborhoods as well, most or all the inhabitants belonged to the same ethnocultural group. Furthermore, different groups might be rivals or opponents — especially in religious matters. Southern whites and southern blacks, German Catholics and Lutherans, Irish Catholics and Protestants, for example, cordially detested each other, and enhanced their identities by knowledge of their enemies. Immigrant settlements saw the need for mutual solidarity to survive and thrive in the new land. Not surprisingly, such solidarity promoted a common political allegiance. In the competitive marketplace of democratic elections, a united front attracted politicians who would trade favors for votes. The favors might include the recognition of the group in the form of nominations for honorific office, or tangible benefits for a neighborhood, or support for policies that the group particularly favored.

The enthnoreligious environment in which the typical American lived a cen-

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tury ago was much more salient than it is today. Certain minority groups today, especially blacks, do resemble nineteenth-century ethnoreligious groups; the intensity of black loyalty to the Democratic party is quite suggestive in this regard. However, Americans today move in such a complex overlap of different groups that religion, in this first sense, is not nearly as important anymore. Historians and political scientists in the first half of the twentieth century, proud of their own cosmopolitan emancipation from the narrow confines of ethnocultural groups, denigrated the desirability of group voting practices. They knew it existed, but saw the particularism of group demands as conflicting with the universalism of good public policy. Intellectuals, especially in the Progressive Era, actively worked for structural reforms that would reduce the importance of both particularistic group voting power and party loyalty. They were quite hostile to ethnocultural factors, and did not study them. The 1960's and 1970's saw a decline in confidence in universalistic Progressive values, and a reaction in celebration of ethnic and racial diversity, which in part accounts for the resurgence of historical interest in our topic.

The second way in which ethnoreligious factors operated was through the explicit mobilization of a religious body, through its ministers, associations, and press, in favor of (or against) definite political goals. The most dramatic case in the nineteenth century involved the Mormons. Less spectacular but more important was the movement within certain bodies in favor of large reforms, especially prohibition of liquor and abolition of slavery. Until recently, cosmopolitan historians avoided analysis of the temperance movement and downplayed the role of religion in antislavery. The central importance of religion is now well established.[3] But it is critical to note that not all religious groups were reformist. All claimed to base their ethics on Christianity, to be sure (excluding the small Jewish groups), but the Christian ethic meant very different things to different bodies. It is the task of a satisfactory historical theory to explain why certain groups were reformist and others not. The ethnocultural model does this and, by linking the reform movements primarily to the Republican party, provides the critical link between religion and voting.

Nearly all the major nineteenth-century denominations — with the important exception of the Southern Baptists — had developed, by 1840 or so, an organizational infrastructure that could be mobilized politically. The ethnocultural model asserts that certain denominations — the pietistic ones — used their structure politically, while others — the liturgical or ritualistic ones — did not. To explain the difference we must explore some old theology and ethics, keeping in mind that certainly theology and perhaps ethics were of much greater salience a century ago than they are today.

The pietistic denominations were those dominated by pietistic members, notably the Methodists, Quakers, (New School) Presbyterians, Disciples, Northern Baptists, Congregationalists, English Lutherans, and Scandinavian Lutherans. The liturgical groups were the Roman Catholics, (Old School) Presbyterians, Episcopalians, and German Lutherans. Some denominations were torn between

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pietistic and liturgical forces (e.g., the battle between the Low Church and High Church Episcopalians). The Southern Baptists, although numerically quite important, contained both elements and was organized so loosely at the time that they are quite difficult to analyze.

The pietists, although of diverse historical heritages, had converged in the early-nineteenth century toward certain distinct theological and moral principles. Probably their most basic unity was the conviction that religious salvation depended upon a deeply personal internal feeling of the presence of Christ within the soul. The pietists rejected predestination and held instead to Arminianism — the idea that all men can be saved by a direct confrontation with Christ (*not* the church) through a conversion experience. In the first half of the century, the revival was the chief means to conversion. Employing revival techniques with phenomenal success, the pietists succeeded in transforming America from a largely de-Christianized society in 1790 (less than 10% church members) to a largely Christianized society by 1890 (more than 70% church members).[4] After mid-century, the revivals grew less important, as the main task became the retention of children of church members. Hence the importance of Sunday schools, YMCA's, and youth groups like Christian Endeavor. (Foreign mission work also became important.)

"Pietism" is not merely a convenient and suggestive term, it also is rooted in European religious history.[5] (The American pietists usually called themselves "evangelicals.") The Pietistic movement in Germany in the seventeenth and eighteenth centuries was a reaction against the liturgicalism of the established Lutheran and Reformed churches. In the early-nineteenth century Pietism took control of the German churches, and many of the dissenters fled to America (hence the origin of the Missouri Synod Lutherans). In Scandinavia Pietism was opposed by the established church, and the dissenters came to America (e.g., the Augustana Swedes and Haugean Danes). Although forms of pietism were important in the English Reformation, the established church was liturgical. Some dissenters fled (Puritans, Pilgrims), and those remaining (Congregationalists, Quakers, etc.) were a small, albeit active minority in England.

The Puritans and Baptists who came to America were Calvinists, not Arminians. In New England the Congregationalists were transformed in a pietistic direction by the First and Second Great Awakenings. The revivals of Charles Finney and Lyman Beecher and the child-nurture teachings of Horace Bushnell transformed the descendants of the Puritans into pietists. (Beecher was a Presbyterian; his denomination split on the issue, while the Calvinists, led by Princeton theologians, moved in a liturgical direction).

The Methodists, a pietistic faction within the Church of England strongly influenced by German Pietism, were superbly organized to exploit the revival technique in America, becoming the largest and most politically active denomination by the time of the Civil War.

The liturgicals, although quite diverse, had a very different theological outlook. Salvation came through strict adherence to the Church, through its sacra-

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ments or its creeds. Spontaneous inner religiosity was dangerous unless properly controlled by priests or theologians. For most liturgicals, certain prescribed rituals were essential (e.g., the Mass and baptism by immersion; compare Orthodox Judaism). Likewise most were hierarchical and authoritarian, so that false doctrine and heresy could be crushed. As opposed to the universalistic Arminianism of the pietists, the liturgicals were particularistic. Only certain souls would be saved, and salvation outside the "true faith" was unlikely or impossible. Heresy, pride and insubordination were the cardinal sins for the liturgicals, hence they devoted themselves to theological scholasticism, heresy trials, and the establishment of parochial schools where their youth would be exposed only to the truth.

The pietists were the aggressive group because of their universalism. Not only could everyone be saved, but they should be. Impediments to salvation in the human environment were morally evil, so it was the duty of every good pietistic Christian to remove them. By the late 1830's the chief evils had been identified as ignorance (hence a crusade for free public schools and, later, compulsory education), intemperance (hence prohibition), and slavery (hence abolitionism). The moral reasoning of the pietist was based upon two deep inner feelings generated by the conversion experience: guilt and achievement. The revivals worked because the preachers successfully infused the listener with a deep sense of guilt over his sins, and anxiety about his terrible fate, and then removed the guilt and anxiety by the joyful experience of conversion to the faith that Christ had reached out and saved a sinner. The modern era is often called an age of anxiety because of the peculiar deep emotional stress faced by individuals. The revivalists identified this anxiety, intensified it, and provided an immediate solution, together with a permanent support network of coreligionists.[7] The achievement of salvation was not just momentary, like some mystical or psychedelic experience; it involved a rebirth, a new life of holiness, continuous self-examination, Bible reading, and the duty to help others to achieve their salvation.

The sense of achievement associated with conversion mandated constant introspection, heightened the sense of anxiety about future individual guilt, and alerted the person to the reality of social evils. It may also have produced a sense of collective guilt for social evil. The sense of achievement carried over into the secular realm, giving a modern, achievement-oriented, future-directed personality to the pietists, while the liturgicals and the unchurched retained traditionalistic, fatalistic personalities. Max Weber came close to this analysis in describing the "Protestant Ethic."[8] For the political historian the critical aspect of pietism is its impact on the public arena. The inner logic of pietism forced it to expand: its "manifest destiny" was to Christianize the entire world, beginning with the country at hand. Much of what the rest of the globe considers distinctively "American" can be traced to this impulse — yet not all; Andrew Jackson and his legions had an equally aggressive policy, but it was directed at foreigners.[9] Some pietist efforts, such as the school crusade, did not encounter articulate, organized or effective opposition; opposition was in the form of passive resistance. The temperance crusade encountered passive resistance at first; only in the mid-

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1850's, when the drys began to pass tough laws (e.g., the Maine Law) did serious opposition form, align itself with the Democratic party, and start winning.

The slavery question was much more complex and, as was obvious to all at the time, was a truly dangerous issue. The ideological, philosophical and religious sensibilities of the early-nineteenth century all pointed to the evil of slavery; by the 1840's there was scarcely a literate person in the North (or in Europe) willing to call slavery a good thing; most called it evil. The pietists, or at least their leading edge, went one step further and proclaimed the act of slave ownership itself to be a sin, despite the reasonably clear Biblical sanction for the practice.[10] The Methodist denomination split North and South in 1844 on the question of allowing a bishop to own slaves, and the Baptists split the same year on the matter of missionaries owning slaves.

Southern pietists rejected the lewd Yankee suggestions that slavery was conducive to sexual immorality. Even more troubling was the argument that the ownership of one person by another blocked the progress of individual salvation and self-development. Eventually the Southern pietists decided that slavery was not a sin and was, in fact, tolerable in this evil world, for the self-development of the blacks was more feasible under the tutelege of Christian slavemasters than under pagan conditions in Africa. The historian must stress that as late as the eve of the Civil War pietistic religion did *not* dominate the South. Indeed, Christians there considered themselves a beleaguered minority.[11] The political-cultural dominance of the pietists came after the war, and in part as a result of battlefield revivals.

The moral reasoning and social ethics of the liturgicals was quite different.[12] They were much more particularistic, and the extended kin group or the church congregation was the center of their concern. Group ethical standards were maintained by manifestations of honor and shame, as opposed to achievement and guilt. Excommunication was the most dreaded penalty, while the love and acclaim of the group was the highest earthly reward (the liturgical churches also guaranteed eternal rewards for everyone who followed their codes.) Proper moral behavior was what pleased God — and the liturgicals *knew* what God wanted, for He had codified it through the teachings of their church. Right behavior, and, ultimately, salvation depended upon following the rules exactly. The inner spirit which the pietists listened to, the liturgicals explained, was a dangerous source of trouble, particularly for individualists with a great deal of pride. Traditionalistic child-rearing practices focused on overcoming pride, breaking the defiant will, and making the child submissive to God, that is, obedient to the rules set down by parents and other authorities. Nothing alarmed pietists more than the Catholic dogma that priests could absolve sinners of their guilt through the sacrament of penance. This meant that a hierarchy was superior to the individual conscience. Catholicism itself was not immune to the individualistic American ethos, and Catholic temperance and revival movements flourished briefly. For the most part, however, the Catholics channeled individual energies into church building, and overcame anxiety by the creation of an elaborate structure of new rituals focused

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around Mary and the Eucharist and inculcated through a separate parochial school system and very active local parishes. The High Church Episcopalians, beating back the Low Church challenge, likewise fostered rituals and ceremony, as well as gothic architecture. If inner piety resulted from the performances of rituals, so much the better, but while anxiety would be relieved, the sense of guilt and achievement was neither sought, nor desired, nor likely.

In non-Catholic high church philosophy, especially the "Princeton theology" that controlled about half the Presbyterian denomination, heavy use was made of the concept of conscience as developed by the eighteenth-century Scottish moralists, including Adam Smith. Conscience was real and reflected the will of God, Princeton said, but following Smith, it also noted that the consensus of the community which approved or disapproved specific conduct was superior to the unaided conclusions of the individual conscience. In other words, this ethics was other-directed and based heavily on honor and shame.[13]

For all the liturgicals, morality was a matter for religion, especially the religious group, and not for the state. The question of imposing their own moral codes through civil laws did not arise, for they were sufficiently powerful nowhere in American politics. The "moral majority" approach is not advantageous to moral minorities. On specific ethical questions, the liturgicals did not hold liquor or slavery to be intrinsically immoral. But they did feel it was wrong for the state to impose a moral standard at variance from their own, and they refused to support politicians who proposed to do so.

Going deeper than theological distinctions between pietists and liturgicals were their different modes of moral reasoning. The pietistic ethic was teleological, that is goal-directed. Moral behavior consisted in the search for goodness, for both the individual and the community. Several intellectual trends came together to forge this ethic. The pietistic religious eschatology (or doctrine of last things) was "post-millennial" — that is, they believed that Christ's second coming would take place after a thousand-year millennium of peace and goodness had descended upon earth. It was the duty of the Christian to evangelize and proselytize, so as to achieve this millennium, beginning immediately. (In a related demand the abolitionists called for the immediate ending of slavery.) German idealist philosophy and theology was a second, major contribution to the ethic. The idealists — Kant, Fichte, Hegel, and, especially, Schleiermacher — influenced American thought directly through the Transcendentalist movement (e.g., R. W. Emerson and H. D. Thoreau), and through theological seminaries late in the century.[14] Idealist ethics stressed the full development and expression of the talents latent in the individual personally. This idealism can be seen in the new emphasis on child-rearing (especially in Horace Bushnell), which stressed encouragement and development of the child's potential in sharp contrast to the older Calvinist emphasis on absolute control over sinful will.[15] The idealist philosophy, with its promise of achievement, emboldened the pietists to the confidence that they could indeed change the world. Finally, in a trend closely related to idealism, romanticism, the focus of religious behavior was placed on

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feeling. Searching for God within one's own soul, as Schleiermacher, Coleridge and Emerson taught, helped the pietist realize that his or her values were truly godly, and that obstacles to those values were sinful.

The moral reasoning of the liturgicals pointed in quite another direction. Few if any were post-millenarians, hence they lacked confidence that the world could be transformed. Most held that the world was inherently evil and dangerous and that the best true Christians could do was to band together, avoid contact with non-believers, and seek salvation within the true faith. Protestants in the South fit this pattern, and were therefore much more reluctant to support any sort of reform, particularly if it meant close association with the ungodly.[16] The German Lutherans, likewise, had a dark and gloomy view of society about them.

Pre-millennialism played an important role beginning in the middle-nineteenth century.[17] Believers felt that Christ's Second Coming would come any hour. Some sects (the Seventh Day Adventists, Nazarenes, Holiness sects, and Jehovah's Witnesses) were organized around this belief, and withdrew completely from social or political activity. A large group of pietists became converted to pre-millennialism in the late-nineteenth century through the revival activities of Dwight Moody, Billy Sunday, and the "dispensationalist" preachers. They emphasized the literal interpretation of the Bible and, adopting Princeton's Presbyterian theology, emerged as the "fundamentalist" movement in the early-twentieth century. The fundamentalists rejected social activism, and, apart from the Scopes episode in the 1920's, avoided politics. However, reborn fundamentalist Christians suddenly emerged as a political force in the 1970's under the aegis of the "Moral Majority" and kindred groups. (The Ku Klux Klan movement of the 1920's was certainly political, but it was rooted more in mainline pietistic groups than in the fundamentalist movement.)

The moral reasoning of the liturgicals, in contrast to the teleology of the pietists, was rule-oriented, or "deontological." Moral conduct consisted not in pursuit of some good, but rather in close adherence to specific rules of conduct. The rules reflected God's will, and were authoritatively articulated through The Church. The Catholics were the most explicitly deontological, but the Protestant liturgicals were also affected. Indeed, before the impact of idealism became felt, all the colleges in eighteenth- and early-nineteenth-century America strongly emphasized courses in morality, with textbooks based on the rule-oriented Scottish "common sense" school of philosophy (John Locke, Shaftsbury, Thomas Reid, Adam Smith).[18] In secular terms, deontological ethics was expressed in a devotion to the letter of the law, especially to the Constitution. The contrasting modes of moral reasoning were expressed directly in politics. Andrew Jackson and his allies, building on the strict Constitutionalism of the Jeffersonians and the "Old Republicans," created a Democratic party committed to a structure of rules in which individuals would be free to act as they chose. Early libertarians like William Leggett were staunch Democrats, and held that, once the proper rules — usually of a *laissez faire* type — were laid out, individuals would create their own little best worlds as they saw fit.[19] Down to the New Deal, Democrats were

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committed to strict Constitutionalism. In reaction against Franklin Roosevelt's loose interpretation and efforts to pack the Supreme Court, many traditional Democrats, typified by Al Smith, broke away.

The Whigs, by contrast, were a teleological party. They had visions of a good society and believed it was the duty of the government to help build it. Their major concern was with economic modernization, and, in view of the underdeveloped economy, it was government's task to establish a national bank, encourage industry through protective tariffs, and provide money for such internal improvements as roads, canals, railroads and port facilities. The Whigs also promoted moral reforms, notably in the arena of public schools and asylums.[20]

The Republican party continued the teleological search for a good society, and, in its early days, added the fervor of post-millennialists. The Civil War would not only crush disunion, it would forever eliminate the evil of slavery, and, in the process, enable the party to push for rapid economic modernization. As Lincoln's Gettysburg Address shows, the Republicans had a deep vision of a great society in the new world that would be a beacon to the old world as well. The old rules hardly mattered, as constitutional quibbles fell away in the face of marching armies.[21]

The approach to political history through the analysis of modes of moral reasoning permits a broadening of the ethnocultural model. The religious alignments of the nineteenth century can be predicted on the basis of theology and, especially, ethics. The fraction of Americans who were not connected with churches — from one-third to one-fourth of the electorate in the second half of the century — may have aligned themselves according to their ethical principles. As for those hedonistic individuals who did not have ethical standards reaching beyond their kinfolk, little can be said, although there is some evidence they were inclined to be Democrats. The distinction between teleological-Republican and deontological-Democratic can also incorporate libertarians and free-thinkers. Indeed, it is possible to generalize further, by identifying teleological ethics and pietism with a "modern" personality, and deontological ethics and liturgicalism with traditionalism. This explains why traditionlistic immigrant groups, like European peasants and southern blacks who crowded into northern cities in the 1900's and 1950's automatically aligned themselves with the traditionalistic party, the Democrats.

In the twentieth century the connections between religion and politics weakened greatly. Pietists in mainline denominations dropped their post-millennial dreams, and concentrated on building happier lives for themselves and their families. Ministers assumed a pastoral rather than prophetic role, attempting primarily to provide psychological uplift and comfort to their parishioners. The minor sects and the fundamentalists, while maintaining a revivalist style, became liturgical in the sense of emphasis on rituals (the revival itself), and on theological orthodoxy. In recent years major groups like the Missouri Synod and the Southern Baptists have poured their energies into defining a rigid orthodoxy based on the infallibility of the Bible. The new evangelicals have been proselytizing vigorous-

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ly, but have avoided politics save where they feel the laws of the land have been altered to incorporate false rules of morality.[23] Hence the "Moral Majority" type of movement can be seen as a negative effort to block or reverse constitutional changes (ERA, pornography, abortion), rather than as a positive movement to build a good society through government action. The Catholic Church, notably in the era of Pope John XXIII, has modernized itself by eliminating traditional rituals and beliefs. The conflict between Papal resistance to birth control and actual practice reveals that most Catholics reject rigid deontological ethics in favor of idealistic norms of personal fulfillment. While radical Catholics in Latin America have adopted post-millennial social goals — "liberation theology" — the parallel movement among American Catholics remains quite weak except on college campuses.[24]

The major theological innovation in this century, as far as politics is concerned, was the rise of the Social Gospel among mainline northern pietists and, to a lesser extent, among Catholics.[25] The origins can be traced to the German theologian Albrecht Ritschl, who rejected the inner search for salvation in favor of a communal search, and to the American Baptist-socialist Walter Rauschenbusch. The national leadership of major Protestant bodies adopted the principles of the Social Gospel early in the twentieth century (at a time when southern Methodists, Baptists and Presbyterians who did not agree with the new theology, had denominations separate from their northern counterparts). The Federal Council of Churches (now the National Council), together with denominational commissions, vigorously promulgated the idea that the Kingdom of God can be built on earth by destroying social evils (militarism, poverty, the sins of capitalism, racism). Collective guilt on the part of those who foster or tolerate such evils is a main theme of the present-day Social Gospel. However, the great majority of the members of the mainline denominations have resisted this new theology, opening a wide chasm between the leadership and the rank-and-file. One result of this tension has been a sharp decline in membership in the liberal churches.[26]

The clerical leadership has had more influence as a direct lobby on government. Early in the century, the Progressive wing of the G.O.P., led by Theodore Roosevelt, accepted the Social Gospel as a guide to government policy. Eventually the conservatives drove out this wing of the G.O.P., but it continues to flourish among liberal Democrats. Theology perhaps plays less a role than the fact that traditionalists form the core of the Democratic party. Inspired by Franklin Roosevelt, the liberal democrats made their highest goal the protection of traditional groups who are most marginal to the modern economy — the poor, blacks, recent immigrants, and employed women. The Republicans, by stressing the central importance of strengthening the modern aspects of the economy with pro-business, low tax, low spending policies, retain a teleological goal for government, albeit quite different in content from the liberals.[27] The libertarian movement, in contrast to both major parties, stresses a deontological, rights- and rules-oriented, *laissez faire* system within which individuals, but not society as a whole, can shape their goals.[28]

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The religious polarities that shaped American politics in the nineteenth century have largely faded. True, the process whereby youth "inherit" parental politics as well as parental religion still produces a correlation between religion and politics. Catholics report Democratic affiliation more often than Protestants, but the actual voting differentials have almost disappeared.[29] However, one of the deep forces of religion, the ethical sense or mode of moral reasoning, still operates to distinguish teleological from deontological approaches to political judgment. In the teleological camp we find both conservative Republicans and liberal democrats — seeking different goals for society, to be sure, but both committed to creating a good society. In the deontological camp we find fundamentalist and evangelical groups, whose pre-millenarian beliefs block the search for social goals, but who oppose the constitutional imposition of rules they find unacceptable, and also the libertarians who demand a reformulation of the rules of society in order to maximize individual options.[30]

NOTES

1. See Paul Kleppner, *The Cross of Culture: A Social Analysis of Midwestern Politics, 1850–1900* (New York: Free Press, 1970); Richard Jensen, *The Winning of the Midwest: Social and Political Conflict, 1888–1896* (Chicago: University of Chicago Press, 1971); and, especially, Kleppner, *The Third Electoral System, 1853–1892: Parties, Voters and Political Cultures* (Chapel Hill, N. C.: University of North Carolina Press, 1979).
2. Jay P. Dolan, *The Immigrant Church: New York's Irish and German Catholics, 1815–1865* (Baltimore: Johns Hopkins University Press, 1975); and Andrew M. Greeley, *The American Catholic: A Social Portrait* (New York: Basic Books, 1977), chap. 11. For an ethnic approach to political history that minimizes the role of religion, theology, and ethics, see Robert Kelley, *The Cultural Patterns in American Politics: The First Century* (New York: Knopf, 1979).
3. Sidney E. Ahlstrom, *A Religious History of the American People* (New Haven: Yale University Press, 1972) is the best and most convenient guide to the theological and structural history — but not the social history. For that, see Martin E. Marty, *A Righteous Empire* (New York: Harper, 1970); and James Hennesey, *American Catholics: A History of the Roman Catholic Community in the United States* (New York: Oxford University Press, 1981.)
4. Kleppner, *Third Electoral System*, pp. 203–207.
5. Kenneth Scott Latourette, *Christianity in a Revolutionary Age*, vols. 1 and 2 (New York: Harper, 1958, 1959), provides encyclopedic coverage of European religious history.
6. The literature is vast; a good starting point is John L. Thomas, "Romantic Reform in America, 1815–1865," *American Quarterly* 17 (1965): 65–81; also Norman H. Clark, *Deliver Us From Evil: An Interpretation of American Prohibition* (New York: Norton, 1976).
7. Fascinating insight into the conversion process comes from the hymns, which played a central role. See Sandra S. Sizer, *Gospel Hymns and Social Religion: The Rhetoric of Nineteenth-Century Revivalism* (Philadelphia: Temple University Press, 1978).
8. See my *Illinois: A Bicentennial History* (New York: Norton, 1978).
9. A brilliant treatment, complete with discussion of the teleological thrust of the Whigs, is Major L. Wilson, *Space, Time and Freedom: The Quest for Nationality and the Irrepressible Conflict, 1815–1861* (Westport, Conn.: Greenwood, 1974); and his essay, "The Concept of Time and the Political Dialogue in the United States, 1828–1848," *American Quarterly* 19 (1967): 619–44. See also Daniel Walker Howe, *The Political Culture of the American Whigs* (Chicago: University of Chicago Press, 1979).
10. For a narrative history, see Louis Filler, *The Crusade Against Slavery: 1830–1860* (New York: Harper, 1960). For recent interpretations, see Ronald G. Walters, *The Antislavery Appeal: American Abolitionism after 1830* (Baltimore: Johns Hopkins University Press, 1976); and Lewis

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Perry and Michael Fellman, eds., *Antislavery Reconsidered* (Baton Rouge: Louisiana State University Press, 1979).

11. Donald G. Mathews, *Religion in the Old South* (Chicago: University of Chicago Press, 1977), chaps. 4 and 6; Ann Loveland, *Southern Evangelicals and the Social Order: 1800–1860* (Baton Rouge: Louisiana State University Press, 1980).
12. No history of morality exists. Highly suggestive is Ernst Troeltsch, *The Social Teachings of the Christian Churches* (1911; New York: Harper, 1931); also see Karl Barth, *Protestant Thought in the Nineteenth Century: Its Background and History* (Valley Forge, Penna.: Judson, 1973). On southern morality, see Betram Wyatt-Brown, *Southern Honor: Ethics and Behavior in the Old South* (New York: Oxford University Press, 1982). On college teaching, see Wilson Smith, *Professors and Public Ethics: Studies of Northern Moral Philosophers Before the Civil War* (Ithaca, N.Y.: Cornell University Press, 1956); and D. G. Meyer, *The Instructed Conscience: The Shaping of the American National Ethic* (Philadelphia: University of Pennsylvania Press, 1972). On religious ethics, see the books by Dolan, Greeley, Marty, Walters, Mathews and Loveland cited above. For a fascinating Freudian approach, see James Gilligan, "Beyond Morality: Psychoanalytic Reflections on Shame, Guilt and Love," in Thomas Likona, ed., *Moral Development and Behavior* (New York: Harper, 1976), pp. 144–58.
13. Meyer, *Instructed Conscience;* also Guy W. Stroh, *American Ethical Thought* (Chicago: University of Chicago Press, 1979).
14. See Claude Welch, *Protestant Thought in the Nineteenth Century* (New Haven: Yale University Press, 1972).
15. See, for example, Lloyd deMause, ed., *The History of Childhood* (New York: Harper, 1974); and Dickson J. Bruce, *Violence and Culture in the Antebellum South* (Austin: University of Texas Press, 1979), chap. 2.
16. See Bruce, *Violence and Culture;* and Loveland, *Southern Evangelicals.*
17. Ernest R. Sandeen, *The Roots of Fundamentalism* (Chicago: University of Chicago Press, 1970); and for a somewhat different emphasis, George M. Marsden, *Fundamentalism and American Culture: The Shaping of Twentieth-Century Evangelicalism, 1870–1925* (New York: Oxford University Press, 1980).
18. Meyer, *Instructed Conscience.* On ethnoreligious differences in rule orientations, see Greeley, *American Catholic,* pp. 196–98; for denominational differences, see David Schuller *et al.,* eds., *Ministry in America* (New York: Harper, 1980).
19. Marvin Meyers, *The Jacksonian Persuasion: Politics and Belief* (Stanford: Stanford University Press, 1957), esp. chap. 2 on Jackson and chap. 9 on Leggett.
20. See the items in note 9, and also Lee Benson, *The Concept of Jacksonian Democracy: New York as a Test Case* (Princeton: Princeton University Press, 1961).
21. Leonard P. Curry, *Blueprint for Modern America: Nonmilitary Legislation of the First Civil War Congress* (Nashville: Vanderbilt University Press, 1968); Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge: Harvard University Press, 1977), chap. 4.
22. Benson, *Jacksonian Democracy;* Bruce Laurie, *Working People of Philadelphia: 1800–1850* (Philadelphia: Temple University Press, 1980), chap. 3, esp. p. 66; Jensen, *Winning of the Midwest,* p. 311; Melvyn Hammarberg, *The Indiana Voter: The Historical Dynamics of Party Allegiance During the 1870's* (Chicago: University of Chicago Press, 1977), pp. 113–14.
23. See Richard Quebedeaux, *The Worldly Evangelists* (New York: Harper, 1978), esp. p. 87; and Harold Lindsell, *The Bible in Balance* (Grand Rapids, Mich.: Zondervan, 1979), chaps. 3, 4, and 6.
24. Greeley, *American Catholic;* Greeley *et al., Catholic Schools in a Declining Church* (Kansas City: Sheed and Ward, 1976); and Edward Wakin and Joseph Scheuer, *The De-Romanization of the American Catholic Church* (New York: Harper, 1970).
25. Charles H. Hopkins, *The Rise of the Social Gospel in American Protestantism, 1865–1915* (New Haven: Yale University Press, 1940); and Kenneth Cauthen, *The Impact of American Religious Liberalism* (New York: Harper, 1962).
26. Jeffrey K. Hadden (*The Gathering Storm in the Churches* [Garden City, N.Y.: Doubleday, 1969]) spotted the trend; Schuller *et al., (Ministry in America)* confirms it.
27. Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* (New York: Norton, 1979); Otis L. Graham, *Toward a Planned Society: From Roosevelt to Nixon* (New York: Oxford University Press, 1976).

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28. Murray Rothbard, *For a New Liberty: The Libertarian Manifesto* (New York: Macmillan, 1978); Friedrich Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960); and Gottfried Dietze, "Hayek on the Rule of Law," in Fritz Machlup, ed., *Essays on Hayek* (New York: New York University Press, 1976), pp. 107–46; and, especially, Hayek, *The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976), vol. 2 of his *Law, Legislation and Liberty*.
29. Norman H. Nie *et al.*, *The Changing American Voter* (Cambridge: Harvard University Press, 1979), pp. 229–32, 258–60; Greeley, *American Catholic*, chap. 5; and David Knoke, *Change and Continuity in America Politics: The Social Basis of Political Parties* (Baltimore: Johns Hopkins University Press, 1976).
30. See J. Roland Pennock, *Democratic Political Theory* (Princeton: University Press, 1979), chap. 5; and Richard E. Flatham, *The Practice of Political Authority: Authority and the Authorities* (Chicago: University of Chicago Press, 1980).

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"Let the People See": Reflections on Ethnoreligious Forces in American Politics*

by Joel H. Silbey

Department of History, Cornell University

I

In a long editorial entitled "Let the People See," which appeared in the *New York Tribune* in 1852, Horace Greeley, the great editor and leader of the Whig party, gloomily evaluated his party's chances at the polls that autumn. He believed that in any work place, a machine shop for example, fifteen out of twenty workmen supported Whig economic policies. However they would not vote for the party. Why not?

> Jones hates the Whigs, because Esq. Simpson is a leading Whig, and feels too big to speak to the common people. Marks has been trained to believe that the Whigs were Tories in the Revolution, and starved his father in the Jersey prison ship. . . . Smithers is for a tariff himself, but his father before him was a Democrat, and he isn't going to turn his coat. Smolker doesn't object to anything his Whig shop-mates propose; but he is a foreigner and thinks the Whigs hate foreigners; so he feels bound to go against them. Pilkins is a heretic in religion, and most of the leading Whigs he knows are Orthodox; and he can't stand orthodoxy any how you can fix it.

And so, Greeley concluded, "for one or another of a hundred reasons, *equally frivolous or irrelevant,* votes are piled up against us — not for anything we as [a] party affirm or propose, but because of considerations as foreign from the real issues of the canvass as is the subjugation of Japan." (Emphasis added.)[1]

Greeley's lament reflected his impatience with such politics, and his refusal to believe in the relevance of any political choice not based on economic matters. Political attitudes, assumptions and values rooted in religion, nationality, history, memory, and prejudice, rather than in a rational, specifically economic, calculus of issues, parties and candidates, could not be important. Greeley recognized their presence but denied their centrality in the political world even when he continually encountered evidence that he was wrong.[2]

Most social commentators and many involved public figures have traditional-

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ly agreed with Greeley. Nathan Glazer has written, for example, that American society is one in which "there are no strangers." Despite examples of persistent ethnoreligious tensions even in such advanced western societies as the United Kingdom and Canada, the United States is "unique" in its refusal "to define itself in ethnic, or religious, or national terms, as our basic founding documents make clear."[3] As long ago as 1940, Judge Sam Rosenman capped this attitude in a resolution presented to the American Jewish Committee.

> Differences in religion, race or nationality have no part in an American political campaign. Elections should be determined exclusively on an American basis rather than on the basis of the alleged separate interests of any religious or racial group. No member of any religion or any race or any nationality has any right to vote on any basis other than his belief as to what is best for the United States alone.[4]

Behind such denials has lain a particular conceptual view of the world, one held both by scholars and by the larger public. As Benjamin R. Barber has recently written, we live in a political culture in which

> in almost every case, our idea of the political begins with the *homo economicus*: man conceived as a secularized, privatistic, self-regarding calculator motivated solely by hedonistic interests and conscious of the political only by dint of selfish prudence. Our politics, in the blunt reductionism of Harold Lasswell, is thus defined by the question "who gets what, when, where and how?" Right and left may differ on the answer but they concur on the question. Our radical, no less than our conservative, ideologies consequently tend to be secular, material, privatistic, and commercial. To the extent community plays any role at all, it is community held together by prudential justice but not divine order, by conflict and contract but neither fraternity nor patriotism, by economics rather than religion, and by interest rather than faith.[5]

Are such matters as frivolous and irrelevant as Greeley thought and as generations of American historians and other commentators have believed? In the past twenty years, as part of a major scholarly interdisciplinary movement, specifically the interpenetration between history and the social sciences, a group of American scholars, the "new political historians," have sketched an American political landscape dominated by just those forces and influences which Greeley and his successors denied as either relevant or central.

The findings grew out of a different kind of historical research, one based on measuring the observed political behavior — usually on election day — of aggregated masses of voters, considering the way they distributed themselves between the parties, and examining the defining elements in each party's coalition. The research focused on "the whole man in his total social environment and a multiplicity of potentially relevant variables whose mix can kaleidoscopically shift over time and place."[6] When done, its discoveries, with their undercurrent of a persistent prejudice so complex and intractable as to escape melioration, have

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been disconcerting to both those who wish to think in terms of class conflict and economic confrontation and to those who think in terms of America's ability to escape tribal conflict. Political warfare in the United States was neither sound and fury signifying little nor a persistent great battle between hostile, competing, economically defined classes and groups.

Electoral politics, at least, had a pattern to it. The American people were intensely politicized, highly organized for political warfare; they turned out to the polls in extraordinary numbers, were steady and traditional in their voting habits, and battled fiercely to establish their different visions of the United States. Only occasionally did a powerful force shake them from their habitual patterns of behavior. Subcultures existed within America with different values, belief systems, and mores, which became politicized under most conditions (certainly in the nineteenth century) to shape the substance and structure of American politics. The particular texture of the political culture was ethnoreligious. There was a wide range of religions, ethnic groups, denominations, and practices in America. The distinctions among these led to different styles and attitudes which came into politics each with its particular political ethos.[7] Groups had been hostile to one another in Europe. They proved to be no less so here. The dead hand of history and the live interaction between groups living close to one another, had an impact on the way masses of Americans defined their situation and acted in politics. In short, the ethnoreligious factor in American politics is not confined to recent days, the Moral Majority, and the Creationists, or to the slightly more distant question of whether a Catholic should be President. It is, rather, an old, deeply rooted element of our political culture. "At least since the 1820s," Lee Benson has written, "ethnic and religious differences have tended to be relatively the most important sources of political differences in the electorate."[8]

Horace Greeley once described Irish immigrants flooding into New York City as "deplorably clannish, misguided and prone to violence."[9] The first point can be applied to most groups in nineteenth-century America — deplorable or not. People lived closely circumscribed lives in small, distinct communities — whether within large cities, villages, or intermediate-sized towns — with, in David Potter's terms, "strong social and psychological forces holding them together."[10] Within these communities a complex and cohesive web of relationships developed that heightened community solidarity and community isolation from other groups. Most of these communities were ethnoreligious in composition, that factor providing the substantial element of community solidarity. Nineteenth-century American culture was particularly imbued with ethnic awareness and religious consciousness, practices, and behavior. Community institutions fostered that ethnoreligious heritage, as well as a deep sense of separatism from one another. As one commentator wrote in 1857 about German Catholics, they "avowedly desire to keep their people apart from Americans with a view more surely to separate them from Protestants and infidels." The Protestants and infidels felt the same way.[11]

At the center of this political world, for much of our history, have been the

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parties. They reflected the multicultural bite of American society. Early on, as a community developed a particular political ambiance and stance, its political aspect was associated with a party. People came into constant contact with their friends and enemies through the parties. "Each party represented not a single denomination, but a loosely structured set of denominations sharing a collective central tendency."[12] Each party absorbed and reflected the political ethos of its constituent groups. Each had different epicenters and were perceived to be distinct from one another. As the editor of the *Know-Nothing Almanac* put it in 1855, the object of each party was clear. The purpose of the Republicans was "to take care of the colored population," of the Democrats, "to take care of the Foreigners and the spoils," and of the American party "to take care of America, the American people, and American interests."[13]

These parties did not simply reflect such differences, however. They led battles, as Alan Lichtman has described them, "across the trenches dividing . . . systems of competing values."[14] One of the crucial things about these tribal groups and one of the major reasons for partisan organizations was their willingness, waiting to be energized, to use the government to accomplish their specific ethnoreligious goals. "History shows us that the contest of race and religion is the bitterest of all, that it has ever been attended with the most frightful, terrible results," the editor of *The Democratic Review* wrote in 1855. "Government," therefore, "ought not to undertake to make, or unmake, religious creeds, for any man."[15] That was certainly one, libertarian strain in the political ethos of the time; but another, strong strain also existed, one that wanted to correct, repair, and reform any iniquities present in society. A role of the state was to reflect and impose specific ethnoreligious, tribal values.

In short, Americans did not have proper regard for each other's differences; rather their differences became the occasion for political confrontation as groups maneuvered for political and social advantage through government action. Arthur Mann reminds us that the early Americans found a case for immigration in "the absorptive power of the host society," Yankee, evangelical, Protestant, and in "the adaptability of human beings."[16] But this did not work. Acute group conflict existed in America of a very particular and persistent kind. Beneath the trappings of unity a war went on to define America — a war fought by political armies each rooted in a different political ethos. The issues produced in this atmosphere "touched lives directly and moved people deeply."[17] One issue, a bill, a matter of dispute, or some specific policy, be it schools, temperance, banks, or tariffs, meant different things culturally to different Americans. Such evidence strongly underlines the fact that "cultural politics is not a side show that occasionally attracts our attention with odd issues like temperance and sabbatarianism; it is as pervasive and powerful in shaping public life as the impact of economic politics."[18]

II

Paul Kleppner has enriched and clarified our understanding of this process in

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numerous, important ways. First, to continue an earlier metaphor, he elaborates and delimits many of the contour lines on the political landscape. He deepens our knowledge of the role of ethnocultural forces in shaping American politics, most specifically, by expounding the particular importance of the religious belief/style dimension. Second, he emphasizes, more clearly and fully than anyone had done previously, the role of contextualism in affecting the various determinants of the vote. Third, he sketches the particular way in which parties played their roles as constituent integrators of social-group tensions and conflicts, rather than as policy-makers or instrumentalist institutions. Each of these things had been said to some extent before. Kleppner takes these ideas much further, however, makes them much richer, makes our understanding much more complex than anyone before him had.[19]

American politics, from the electoral realignment of the 1850's, through the party stalemate after the Civil War, to the political disruption and realignment in the 1890's, was the product of a vibrant social reality and the political dynamics it unleashed. Voters, Kleppner wrote in his first book, "were more often concerned with matters which impinged on their daily lives directly and which immediately challenged their personally structured value systems than they were with national problems whose direct salience was not clearly perceptible to them."[20] And, elsewhere:

> Nineteenth-century American partisanship was not rooted in economic distinctions. Neither gradations in wealth nor perceived differences in status nor shared orientations toward the work experience were at the core of partisan commitments. Partisan identification mirrored irreconcilably conflicting value conflicts emanating from divergent ethnic and religious subcultures.[21]

He particularly hammers on one central theme: the pietist-antipietist split among religious denominations, as the major shaping influence determining the character of the political world. The partisan cleavages of the era, he sums up, "involved a value-and-interest conflict between Yankee moralist subculture and white southern subculture . . . [and] a religious-value conflict between pietist and antipietist subcultures."[22]

There were some interesting limits to this central thrust of American political life. Kleppner is very careful to remind us that ethnoreligious differences "were *relatively* more important as determinants of nineteenth century social-group cohesiveness and party oppositions than were economic attributes or social status."[23] This is a recognition both that other possibilities existed and that a matter of subtle measurement is involved.[24] Still, Kleppner makes it very clear where his research has brought him.

Kleppner's findings open up another, very large question as well: that of a contextualism which affected and shaped the patterns of American voting behavior. As Philip Ennis suggests, each generalized, defining influence on political behavior "is differentially drawn into political life depending upon the kind of community [present] — its makeup, situation and history."[25] Analyses of mass voting behavior, Kleppner reminds us, "require sensitivity to sociopolitical con-

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texts, specific conditions, and historical experiences — as well as economic, ethnic and religious identifications.'' What looked like the same general influence had differential impact on voters because of differences in people's outlooks framed by such contextual factors. Being a Baptist, Kleppner suggests, does not have ''the same psychological meaning in all contexts; [the] intervening experiences of the group, prevailing political-structural conditions, in social-structural milieux, and variations in party characters'' all have ''salience'' in determining ''specific partisan choices.''[26] Such variations have to be carefully specified and delimited for our full understanding.

Kleppner also reaffirms the centrality of the political parties in this environment. ''For most social groups,'' he writes, partisanship was ''a means of expressing and defending subcultural values''; party choice was an act of group solidarity. Each party represented and reflected the shared values of its component groups.[27] Parties were delegates to the national government from their constituent groups. Each party fought for the future of the nation. The character of each was determined by its ethnoreligious clientele. The Republican party, in general, was the home of the absolutist, moralist groups nurtured in the Yankeedom of New England and the pietism of that region's western outposts. The Democrats were different. They were the product of Catholicism, Southernism, antipietist Protestantism, and of certain ethnic groups as well. As one of the Adams clan succinctly put it, they were ''Copperheads and curs — their ideas [were] low and Irish.''[28] Public policy emerged out of the particular constituent demands of each membership. The GOP built appeals rooted in nationalism, anti-Catholicism, and positive government action to purify America. The Democrats, at least until the 1890's, fought against such in the name of cultural heterogeneity and in favor of freedom from the coercive restraints demanded by Republicans.

Members clung loyally and tenaciously to their parties because to many they were churches, not cold, lifeless organizations. ''Late nineteenth century American parties,'' Kleppner argues, ''can meaningfully be thought of as political churches . . . parties became the secular analogues of churches.''[29] The Republican party was, as one preacher had it, ''the *party* of God, the *party* of Jesus Christ,'' battling ''against the party of iniquity.'' It was ''the Republican Church.'' The Democratic party, in its way, was the same. It is no wonder that a New York governor could suggest in this atmosphere, therefore, that a ''nonpartisan is an unbeliever.''[30] Even third parties, including those usually defined as economic protest groups, in Kleppner's view, did not escape this religious quality or the ethnoreligious structuring of their membership.

Professor Kleppner's work completes a stage in the revision of American political history by the new political historians. His research has taken the basic arguments of that group and made them richer and more whole than they were. Their substance is clear, the landscape well marked, and the roadmaps nicely detailed. This is a tribal conception of politics. Despite tendencies towards unity and the presence in our history of a common set of shared assumptions, institutions, and rituals, American social life in the nineteenth century produced situa-

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tions in which tribal, not national, mores imposed group standards, objectives and behavior in politics, albeit within a national frame of reference.

Tribes were religious, ethnic, and cultural groups that identified themselves as distinct in some form; certainly they did so in politics. The members may have clustered geographically (they often did), but the important thing about them was their awareness of their common association and of the presence of hostile others close by and threatening. It was a complex tribalism, not always easily sorted out but present and predictable nevertheless. Sometimes the interaction among the different tribes inhabiting the American space was visceral, sometimes it was ideological, sometimes it was the result of specific policy formulations and pressures. The nature of this interaction depended largely on how the ethos of each tribe was perceived or activated within the political arena. There were occasional flashes of violence in the confrontation, but perhaps it is a testament to the power and importance of the political system that the tribes usually relied on it to handle and resolve their conflicts.[31]

III

All of this is quaint and interesting, but has not that world departed forever? Recently, in the *Yale Review*, James Turner cited Professor Kleppner's research findings as "one of the most spectacular triumphs of historical research in recent years."[32] American nineteenth-century politics is now the subject of "a much more subtle interpretation . . . as a form of cultural conflict and accommodation." But, he then goes on to say, "except for a few political scientists, who cares? Unless history has some meaning for our lives now, what good is it?" Certainly economic differences and forms of class consciousness have played a much greater role in affecting the dynamics of popular voting since the 1930's than they had earlier. Still, tribal forces continue to be influential in both similar and revised guises, perhaps with as much commitment to government interventionism as ever. The politics of ethnoreligious differences, of differing sub-group value systems and conflicts among them, are as recent as the latest anti-abortion rally and the most recent electoral campaign. Kennedy in 1960, the Goldwater campaign which startlingly revived very ancient divisions indeed, the revival of white ethnicity in the 1970's and of black and religious difficulties, suggest the persistent quality of these patterns, as does the persistence of an interventionist ethic in the American psyche rooted in conceptions of right behavior. We have much scholarly evidence of this. As one recent study of popular voting concluded, "religion continues to exert an impact on party identification over the period studied [1952-1972]. . . . Furthermore, the connection between religion and party identification does not seem to diminish across groups with changes in socioeconomic status or suburbanization."[33] It can be "openly questioned," another scholar argued, "whether the dual processes of acculturation and assimilation have so eroded the culture bases of ethnic groups that distinctive political styles are no longer identifiable. Fundamental value orientations die hard, and

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unless assimilation runs its full course, distinctive ethnic value orientations will remain to act as guides to distinctive ethnic social and political behavior.''[34]

In the everyday realm of political activity similar evidence abounds. According to an Associated Press story in July 1980, Ronald Reagan, in trying to lure Democrats to his side, intended to appeal, in familiar language, to ''a community of shared values.'' His people were said to have targeted white Baptists as a group to be particularly wooed by the party in the campaign.[35] Since the election, efforts to, in David Broder's words, ''expand the government's efforts to prescribe and regulate individual behavior'' have grown. In one story about book censorship in high schools, *Time* magazine again used quite familiar words and concepts. ''This is not book burning or book banning, but a rational effort to transmit community values.''[36]

Contemporary ethnoreligious conflicts, at first glance, do not appear to have the sharp edges of those in the nineteenth century and take different forms. They may have altered substances, but the role of ethos, rooted in cultural, religious, ethnic, and locational differences, is unmistakable. Tribalism may take many forms, sometimes ones considerably more respectable and muted than those of more raucous times. But it has been a persistent influence despite a supposedly secularized and technocratic world. Science and economic rationalization had been expected to reduce, if not eliminate, ''man's attachment to ancient ties of common ancestry, common land and common faith,'' but such ''ties of race, nationality and religion'' have retained their importance.[37] So strong has this influence remained that Walter Dean Burnham suggests that ''the pervasiveness of religious cognitions in American political life is yet another — and very important — comparative peculiarity of this country in the cosmos of advanced industrial societies.''[38]

The idea of a potent, persistent, ethnoreligious tribalism bothers many historians and public commentators. Some have been quick to dismiss its importance or its persistence. Professor Carl Degler, President of the Organization of American Historians, recently argued that ''surely the American people are more than a collection of diverse nationalities, classes and genders living between Canada and Mexico.''[39] Others have sought solace in the presence and strength of cultural pluralism as the dominant force shaping American history. One popular magazine recently defined America as ''a mosaic of cooperating cultures, differing in lifestyles and languages within the broad confines of U.S. democracy and nationhood.''[40] Another actually quoted Horace Greeley as pointing to the ''fragility'' of such forces. In writing about the Know-Nothing Movement in 1855 Greeley said of that movement that ''it would seem as devoid of the elements of persistence as an anti-Cholera or anti-Potato rot party, and unlikely long to abide the necessary attrition of real and vital differences of opinion among its members with respect to the great questions of foreign and domestic policy which practically divide the country.''[41]

Such comments miss the important point. It is true that the contemporary polarization is not as clear cut as it was. But the realities of American pluralism

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have never been clearly dominant, for pluralism was only one, and not the major force in the relations among the different sub-cultures in America. Certainly, within the political structure of nineteenth-century America, there was a persistent battle over whether Catholics, and some other groups as well, would be allowed here and, if they were, under what conditions. The battle went a particular way. Nevertheless all of this suggests the presence and power of certain constraints in the American political system. Given these realities, their complexities have to be explored. It remains, in other words, for political historians and analysts to get on with the job of specifying and sorting these out within the general tribal environment present.

IV

Political historians still have much work to do in delimiting these forces and how they operated. A full research agenda would include much about the political parties. The old and persistent canard that they were nothing more than Tweedledum and Tweedledee, with nothing in the way of principle or issues dividing them, has been laid to rest and replaced by recognition of the vibrant confrontations of tribal warfare. Tribes were joined in party confederacies in a bipolar political world resulting from constraints imposed by the Constitution. This bipolarism levied conditions and restraints on individual tribes and required a continuing emphasis on the common themes that held their confederacies together against the coalition of their enemies. Coalitions impose the necessity of compromising, watering down, looking the other way about divisive matters. The need to find a winning formula dictated careful interaction among tribes that had different priorities. How was all of this done?

Party leaders were at the center of the process of building winning coalitions and keeping groups together. They had to become adept at fitting the pieces of a complex mosaic together in ways which would be constructive for their purposes. At the same time, they had to be adept at arousing their troops through specific appeals and visions of the world. How much room for maneuver did they have in all of this? How autonomous were they of the influences shaping them? How did they mediate and compromise and operate so as to meet the symbolic needs of their intense constituent groups? Party leaders in this kind of situation were, as Morton Keller refers to them, "part tribal chieftain[s]" and part coalition builders.[42] Professor Kleppner is particularly good in tracing the always present, difficult vicissitudes of the party leaders as they tried to operate within the constraints of the internal dynamics of the party coalition.

If the parties were primarily constituent and shaped only by their social groups, then there is a very big problem indeed. They cannot be generally responsible and instrumentalist in policy-making but become, instead, primarily symbolic and myth-reinforcing. Professor Kleppner's findings seem to stress the inability of party leaders to escape from their tribal delegate roles even though some tried to do so. His party leaders usually were buffeted by internal social

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pressures which they were unable to overcome. They apparently had little maneuvering room or leadership capability. The parties he describes have been characterized by one reviewer as "vessels with neither rudder [nor] crew."[43] The passengers ran the ship.

Professor Jensen has argued that a new kind of party leader emerged in the 1890's, one more cosmopolitan and less bound by the dictates of the tribes.[44] Still, the tension was not completely resolved. Both kinds of party leaders were present, even between 1850 and 1890, and we have not yet fully examined the possible varieties of the leaders' behavior and the possibilities under differing conditions and within various parties. The point is that, for the moment, the question of the constraints on and the opportunities for political leaders to operate remains unclear. Further research and elucidation are needed before the functioning of American political leaders within their specific political universe will be fully understood.

A related and equally important question rising from the tribal nature of parties concerns how, when, and with what effort, voters were mobilized to go to the polls on election day. The American scene was a rich cauldron of simmering problems, ideas, behaviors, and events that were all possible political foci and ones that could affect and be affected by the cultural tensions present. But how were they set off, ignited? The significant factor in electoral politics, once the nature of group loyalties has been established, is this triggering matter. We have to elaborate how campaigns are structured and carried out. What did the parties do here? Was the mobilization the product of the way parties operated in campaigns? Professor Kleppner's answer defines the direction of affect clearly: "These antagonistic political subcultures did not spring to life in response to partisan rhetoric. Rather, the rhetoric expressed the emotional and psychological perspectives of each party's constituent groups."[45] By implication, this leaves little for parties to do.

The question of mobilization, however, remains undeveloped. The stimuli provided by the parties, the importance and nature of campaigns to get out the vote, the reasons voters came out and did what they did, need further elaboration. Were voters stimulated to be purposive, or automatic and unthinking, or a mixture of both? Was the party the translator and starter engine? What was the nature of the interaction between voters and party? Voting was not simply a given but the product of perceptions and actions that often had to be stimulated, or else they would remain imminent, not actual. There is a reservoir of deeply held passions and attitudes, which has to be triggered into political action. Al Smith's candidacy in 1928 and John Kennedy's in 1960, for example, triggered significant increases in religiously defined voting. But such increases were not automatic. The thrust of recent research into voting behavior emphasizes the stimulative effect of the way campaigns are carried on, candidates act, and parties engage themselves. As Alan Lichtman points out, for example, Al Smith met the religious issue unambiguously and directly in 1928.[46] The result was an upsurge of a certain kind of behavior in that election consequent to Smith's behavior. At other times too, specific kinds of

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campaign activities have produced specific voting responses. Burnham points out that these tribal issues emerge "under the right circumstances and *with skilled leadership*." [Emphasis added.][47]

Finally, the focus of voter loyalties in a highly tribal but also highly partisan political system needs further elaboration. There is much evidence of the strong, primary political attachment of voters to their parties, first, last, and always, not necessarily only to, or generally to, their social groups, in both present and past situations.[48] It is the party that comes to embody their political faith. They call themselves Democrats (or Republicans) first when engaging in political activity — not Catholics, pietists or Germans. Does such party loyalty change or affect the interaction between tribal groups and parties? Strategies need to be developed to explore this further, since it goes to the heart of how the political system functions and how tribal warfare occurs. In short, once more, questions of the relationship among social-tribal tensions, the party system, and voter behavior remains open for further exploration.

The answers to all of these questions are affected by the other major factor stressed by Professor Kleppner, the contextual element in American voting behavior. This element has profound implications for the study of American politics, past and present. If Americans react to political stimuli or behave in a wide variety of ways due to differences in place, history, experience, and perceptions, then formidable consequences follow. At one level, for example, such contextualism, along with the tribalism already referred to, goes a long way toward explaining the relative, persistent failure of class-conscious political movements in American political history.

As Geoffrey Blodgett has written, "class consciousness and economic radicalism were shallow and ephemeral characteristics" in the American electorate.[49] Friedrich Engels, as quoted by Professor Kleppner, expressed the importance of tribal influences as long ago as 1893:

> American conditions involve very great and peculiar difficulties for steady development of a worker's party. . . . [I]mmigration . . . divides the workers into two groups: the native-born and the foreigners, and the latter in turn into (1) the Irish, (2) the Germans, (3) the many small groups, each of which understands only itself: Czechs, Poles, Italians, Scandinavians, etc. And then the Negroes. To form a single party out of these requires quite unusually powerful incentives.[50]

Yet the difficulty of creating a cohesive party is greatly compounded by the fact that the members of "the many small groups" react differentially to economic stimuli, and to tribal ones, as well. It is not only that each group — Czechs, Poles, Italians, etc. — "understands only itself"; individuals within each group react politically in patterns which vary to some degree from the group norms. The "unusually powerful incentives" suggested by Engels are almost impossible to contemplate or conceive, given contextualism in group reactions. We know from the research of several historians that even during a depression of widespread

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impact, a variety of responses, not all to the economic pressures present, occurs though within a central tendency.[51]

The larger implication to be drawn from all of this is that the American people have never been able to see anything whole or react uniformly, cleanly, clearly, and directly to specific stimuli. In recent years, much has been made of the fragmentation and particularism in our politics even in the face of national danger.[52] Contextualism is one aspect of this which has not always been fully grasped. It suggests not only our heterogeneity (something which observers going back to James Madison have recognized), but also how difficult the shaping of responses, reaction, and action always has been in America. This difficulty is likely to continue despite the growing power of the media and other forces whose nature might be expected to counteract the contextual element.[53] Research incorporating these ideas promises a great deal of additional understanding of such problems throughout American political history.[54]

This last matter underscores one final item. Description of the way people choose to vote and the consequent nature of the party system is both useful and necessary and leads to another question directly: Given what we have learned from the work of Professor Kleppner and others about tribalism, contextualism, and the nature of poltical parties, what then is the capacity of the political system to perform the necessary functions of governing? The people rule or, more accurately, vote in our system, but how, why, and for what purpose? It is clear that the nature of the voting system suggests repeated, formidable problems in the shaping of public policy, public understanding of the needs of the polity, and development of mass support for the political system.

Burnham has called our political system a "Tudor polity", one rooted in premodern conflicts of a non-developmental, non-economic nature even when problems of development, the distribution of economic resources, and the shaping of economic policy have moved to the center of the national stage. Instead of confronting them, Burnham remarks, we have remained "preoccupied" from the start of our national history and into the present "with problems involving the integration of diverse and often antagonistic subcultures."[55] He further suggests that this misplaced concern and the persistence in our affairs of the dead hand of a history and attitudes long gone, of preoccupation with conflicts rooted in a deep tribal past, opens the way for the hegemonic domination of the system by cosmopolitan elites rather than by the people, with the consequent atrophying of the institutions of public policy-making and political expression. This is followed by the decline of popular involvement in politics.[56] It is a pessimistic commentary based on his reading of present realities and of what the new political history has discovered about our behavior. Moreover, it is a devastating comment on the capacity of the system and is only reinforced by the implications of contextualism discussed above. Burnham's interpretations have not been universally accepted by scholars. Nevertheless, his preoccupation with a system's ability to rule is a necessary one that political historians are only beginning to turn to and consider extensively. It is one more area of needed study rooted in the implications of the concerns and findings of such new political historians as Professor Kleppner.

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V

The visions of the new political history have not swept everything before them. That work, produced over the last generation, remains an important aspect of a longer-range challenge to the traditions of the Progressive historians, who so long dominated American historiography with their visions of the onward march of history toward the triumph of the good. That challenge has found great fault with what Christopher Lasch has called the Progressivists' "drastic simplification of issues; synthetic contrivance of political and intellectual traditions . . . [and] strident partisanship," and, most of all, with their commitment to a certain kind of persistent political conflict in the American past.[57]

What will replace the Progressive vision among historians remains unclear at the moment. There are several candidates of unequal strength and merit. As earlier noted, many people remain uncomfortable with the new political history and its findings; they seek to avoid taking into account this new interpretation of the past rather than trying to confront it and proceed from there. But the ethnoreligious findings of this new political history, as demonstrated by Professor Kleppner and others, hold out an entry of greatest importance into the American past (and present). Its insights must be incorporated into future historical research and understanding.

NOTES

1. *New York Tribune* (weekly), September 11, 1852.
2. During the 1850's Greeley was much involved in battles with the Know-Nothings, who made their position quite clear. "Romanism as a political system, is the avowed and implacable foe of independent thought and action, of improvement, and of the rights of individuals and nation" (*Albany Statesman*, May 25, 1857).
3. Nathan Glazer, "American Jews: Three Conflicts of Loyalties," in Seymour Martin Lipset, ed., *The Third Century: America as a Post-Industrial Society* (Stanford: Hoover Institution Press, 1979), p. 224.
4. Quoted in Debra Dash Moore, *At Home in America: Second Generation New York Jews* (New York: Columbia University Press, 1981), p. 213.
5. Bernard R. Barber, "Review of Glen Tinder, *Community*," in *The New Republic* (June 28, 1980), p. 34. See also, Murray Friedman, "Religion and Politics in the Age of Pluralism," *Publius* 10 (Summer 1980): 45–75.
6. Ronald P. Formisano, *The Birth of Mass Political Parties, Michigan, 1827–1861* (Princeton: Princeton University Press, 1971), p. 9.
7. The classic volumes in the new political history include: Lee Benson, *The Concept of Jacksonian Democracy: New York as a Test Case* (Princeton: Princeton University Press, 1961); Formisano, *Birth of Mass Parties*; Michael Holt, *Forging a Majority: The Forming of the Republican Party in Pittsburgh, 1848–1860* (New Haven: Yale University Press, 1969); Richard J. Jensen, *The Winning of the Midwest: Social and Political Conflict, 1888–1896* (Chicago: University of Chicago Press, 1971); Samuel T. McSeveney, *The Politics of Depression: Political Behavior in the Northeast, 1893–1896* (New York: Oxford University Press, 1972); Bruce Stave, *The New Deal and the Last Hurrah: Pittsburgh Machine Politics* (Pittsburgh: University of Pittsburgh Press, 1970); John Allswang, *A House for All Peoples: Ethnic Politics in Chicago, 1890–1936* (Lexington, Ky.: University of Kentucky Press, 1971); David Brye, *Wisconsin Voting Patterns in the Twentieth Century, 1900–1950* (New York: Garland Publishing, 1979); Robert Kelley, *The Cultural Pattern in American Politics, The First Century* (New York: Knopf, 1979); and Joel H. Silbey, *et al.*, *The History of American Electoral Behavior* (Princeton: Princeton University

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Press, 1978). Many seminal articles are included in Joel H. Silbey and Samuel T. McSeveney, eds., *Voters, Parties and Elections* (Waltham, Mass.: Xerox College Publishing, 1971).

Important articles describing and assessing the movement include: Robert Swierenga, "Ethnocultural Political Analysis: A New Approach to American Ethnic Studies," *Journal of American Studies* 5 (April 1971): 59–79; Samuel T. McSeveney, "Ethnic Groups, Ethnic Conflicts, and Recent Quantitative Research in American Political History," *International Migration Review* 7 (Spring 1973): 14–33; Richard L. McCormick, "Ethno-cultural Interpretations of Nineteenth-Century American Voting Behavior," *Political Science Quarterly* 89 (June 1974): 351–77; and Allan G. Bogue, "The New Political History in the 1970s," in Michael G. Kammen, ed., *The Past Before Us: Contemporary Historical Writing in the United States* (Ithaca, N.Y.: Cornell University Press, 1980), pp. 231–51.

8. Benson, *Concept of Jacksonian Democracy*, p. 165.
9. Samuel P. Hays, "Political Parties and the Community-Society Continuum," in William Nisbet Chambers and Walter Dean Burnham, *The American Party Systems*, 2nd ed. (New York: Oxford University Press, 1975), p. 158.
10. Arthur Mann, *The One and the Many: Reflections on the American Identity* (Chicago: University of Chicago Press, 1979), p. 73.
11. Quoted in Coleman J. Barry, *The Catholic Church and German-Americans* (Milwaukee: Bruce, 1953), p. 11.
12. Paul Kleppner, *The Third Electoral System, 1853–1892: Parties, Voters and Political Cultures* (Chapel Hill: University of North Carolina Press, 1979), p. 197.
13. *The Know-Nothing Almanac for 1855* (New York: DeWitt & D., 1855), p. 26.
14. Allan J. Lichtman, *Prejudice and the Old Politics: The Presidential Election of 1928* (Chapel Hill: University of North Carolina Press, 1979), p. 10.
15. *The Democratic Review* (October 1855), p. 342; and (January 1856), p. 11.
16. Mann, *One and the Many*, p. 73.
17. Hays, "Political Parties," p. 158.
18. Kelley, *Cultural Pattern in American Politics*, pp. 265–66.
19. Kleppner's two books are, of course, *The Third Electoral System*; and *The Cross of Culture: A Social Analysis of Midwestern Politics, 1850–1900* (New York: Free Press, 1970). I am also dealing here with two articles of his in anthologies: "From Ethnoreligious Conflict to 'Social Harmony': Coalitional and Party Transformations in the 1890s," in Seymour Martin Lipset, ed., *Emerging Coalitions in American Politics* (San Francisco: Institute for Contemporary Studies, 1978); and "The Greenback and Prohibition Parties," in Arthur M. Schlesinger, Jr., ed., *History of U.S. Political Parties*, vol. 2, *1549–1696* (New York: Chelsea House, 1973); and with an unpublished paper kindly shown to me by Professor Kleppner (and written with Stephen C. Baker), "The Impact of Depressions on Mass Political Behavior: The United States in the 1870s, the 1890s, and the 1930s."
20. Kleppner, *Cross of Culture*, p. 18.
21. Kleppner, *Third Electoral System*, p. 144.
22. *Ibid.*, p. 58. The dust jacket of this book reminds us that Kleppner's work challenges "the liberal-rationalist assumptions that have dominated political history."
23. *Ibid.*, p. 371.
24. As Allan Bogue has written, "the challenge of modern research lies in assigning the proper weights to a number of independent variables rather than in the admission that there is more than one" ("Billington's *Frederick Jackson Turner*: An Essay Review," *Pacific Northwest Quarterly* 64 (October 1973): 177.
25. Philip Ennis, "The Contextual Dimension in Voting," in William N. McPhee and William A. Glaser, *Public Opinion and Congressional Elections* (Glencoe, Ill.: Free Press, 1962), p. 184.
26. Kleppner, *Third Electoral System*, pp. 369–70.
27. *Ibid.*, p. 367.
28. Dale Baum, "The Political World of Massachusetts Radicalism: Voting Behavior and Ideology in the Civil War Party System, 1854–1872," (Ph.D. diss., University of Minnesota, 1978), p. 353.
29. Kleppner, *Third Electoral System*, pp. 196–97.
30. *Ibid.*, p. 328; Kleppner, "From Ethnoreligious Conflict to 'Social Harmony'," p. 53; and Richard L. McCormick, "Shaping Republican Strategy: Political Change in New York State, 1893–1910," (Ph.D. diss., Yale University, 1976), p. 241.

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31. On outbreaks of violence, see Michael Feldberg, *The Philadelphia Riots of 1844: A Study of Ethnic Conflict* (Westport, Conn.: Greenwood, 1975).
32. James Turner, "Recovering the Uses of History," *Yale Review* (Winter 1981), p. 223.
33. Joan L. Fee, "Religion, Ethnicity and Class in American Electoral Behavior," in William J. Crotty, ed., *The Party Symbol: Readings on Political Parties* (San Francisco: W. H. Freeman and Company, 1980), p. 271.
34. Dale C. Nelson, "Ethnicity and Socioeconomic Status as Sources of Participation: The Case for Ethnic Political Culture," *American Political Science Review* 73 (December 1979): 1026–27.
35. See especially, Walter Dean Burnham, "American Voting Behavior and the 1964 Election," in Silbey and McSeveney, *Voters, Parties and Elections*, pp. 366–95; and *Time*, July 21, 1980, p. 9. The Associated Press story is in *The Ithaca Journal*, July 11, 1980.
36. David Broder, in *The Guardian Weekly*, December 14, 1980, p. 17; and *Time*, January 19, 1981, p. 86.
37. Mann, *One and the Many*, pp. 17–18.
38. Burnham, "The 1980 Earthquake: Realignment, Reaction, or What?" in Thomas Ferguson and Joel Rogers, *The Hidden Election: Politics and Economics in the 1980 Presidential Campaign* (New York: Pantheon, 1981), p. 106.
39. Mann, *One and the Many*, p. 44; and *Time*, July 7, 1980, p. 23.
40. *U.S. News and World Report*, July 7, 1980, p. 33.
41. Burnham, "American Politics in the 1980s," *Dissent* 27 (Spring 1980): 150.
42. Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge: Harvard University Press, 1977), p. 35.
43. Richard F. Schier, "Review of Lipset, *Emerging Coalitions*," *American Political Science Review* 74 (March 1980): 205.
44. Richard J. Jensen, "Armies, Ad-Men and Crusaders: Types of Interparty Election Campaigns," *The History Teacher* 2 (January 1969): 33–50; and *idem*, *Winning of the Midwest*.
45. Kleppner, *Third Electoral System*, p. 142.
46. Lichtman, *Prejudice and the Old Politics*. On more recent times, see Benjamin Page, *Choices and Echoes in Presidential Elections* (Chicago: University of Chicago Press, 1978).
47. Burnham, "American Politics in the 1980s," p. 150.
48. See, of course, Angus Campbell *et al.*, *The American Voter* (New York: Wiley, 1960), and the vast literature it has spawned.
49. Geoffrey Blodgett, "A New Look at the American Gilded Age," *Historical Reflections* 1 (Winter 1974): 235. One might ask where economic differences fit into such politics, under what conditions, whether they are primarily the concern of political elites rather than electoral masses, etc. It is a question that has to be answered and approached with these other matters in mind and well in hand. For some interesting reflections on such conditions, see Lee Benson, "Group Conflict: A Critique of Some Marxian and Tocquevillian Theories," in Allan G. Bogue, ed., *Emerging Theoretical Models in Social and Political History* (Beverly Hills, Calif.: Sage Publications, 1973), pp. 123–50.
50. Kleppner, *Third Electoral System*, p. 238.
51. See McSeveney, *Politics of Depression*, *passim*, on the 1890's; and James L. Sundquist, *Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States* (Washington: Brookings Institution, 1973), on the 1930's.
52. See Burnham, "American Politics in the 1970's: Beyond Party," in Chambers and Burnham, *The American Party Systems*, pp. 308–57.
53. See James David Barber, *The Pulse of Politics: Electing Presidents in the Media Age* (New York: Norton, 1980).
54. For one example of the revision of our general understanding of the structure of voting as affected by contextual effects, see Lee Benson, Joel H. Silbey, and Phyllis F. Field, "Toward a Theory of Stability and Change in American Voting Patterns: New York State, 1792–1970," in Silbey *et al.*, *History of American Electoral Behavior*, pp. 78–105.
55. Burnham, "Voting Behavior and the 1964 Election," in Silbey and McSeveney, *Voters, Parties and Elections*, p. 391.
56. Burnham, "Politics in the 1970s," *passim*.
57. Christopher Lasch, "On Richard Hofstadter," *New York Review of Books* 20 (March 8, 1973): 12.

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Religion, Politics, and the American Polity: A Dynamic View of Relationships*

by Paul Kleppner

Department of History and Political Science
and Office for Social Science Research
Northern Illinois University

> During the Renaissance, among the fellow citizens of Machiavelli, there arose a new adage calling attention to the common observation of the time — namely that the thought of the palace is one thing, and that of the public square is another.
>
> Karl Mannheim[1]

For generations, political historians used "the thought of the palace" to describe politics and party battles. They consciously borrowed the words of articulate political leaders and (perhaps) unconsciously adopted their mind sets to depict election contests as struggles over the specific contours of national policy. They pictured millions of citizens trooping to the polls to record their views on such subjects as the Kansas-Nebraska Act, Civil Service Reform, currency inflation, and the latest change in some arcane tariff schedule. The citizens who marched through the pages of these traditional historical accounts were deeply interested in politics, attentive to current events, informed of party and candidate differences on the issues of the day, and motivated to cast their ballots accordingly.

While these accounts accorded well both with rational models of voter behavior and with what high school civics texts argued the electoral process ought to be like, the reality of "the public square" was another matter. The survey research findings of the early 1950's captured that thought rather well.[2] They depicted a collective electorate whose level of political involvement was generally low, whose knowledge of political affairs was sorely deficient, whose interest in politics was sporadic at best, and whose election-day behavior very rarely satisfied the minimal requirements of issue-oriented voting. The atomized, informed,

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issue-conscious citizen of the historians' accounts was indeed rare, and the modal citizen of the survey findings voted for a particular party-candidate alternative in a particular election because he had customarily voted that way. Furthermore, in so doing he was quite likely to be acting on the basis of an attachment to that party acquired from his parents during his early childhood years.[3]

Needless to say, in the expansive climate the late 1950's and early 1960's, findings such as these turned voting behavior analysis into a growth industry. Not the least among the progeny of that growth was what has since come to be known as the "new political history." Some political historians began to question dominant interpretive frameworks and, more importantly as it turned out, to adopt new research methodologies to probe the contours of past politics. In the context of an intellectually conservative discipline, one that venerates its own traditions even more ardently than it does the nation's past, these historians embarked upon a radical course. They ceased depending primarily on the post-election statements of political elites to discern how masses of citizens had cast their ballots. Instead, they examined the voting and census returns to determine whether there were consistent differences in partisanship among socially distinct types of voting units.[4]

To speak now of these early efforts evokes a sense of nostalgia. In more ways than one, those were less complicated and more hopeful days. Then the studies undertaken were quite limited in geographic scope, and necessarily so since the requisite data usually had to be collected, processed, and analyzed without benefit of a team of research assistants, high speed computers, or even the programmable calculators that are now in common use. For the most part, the political historians doing the work were equipped with only rudimentary statistical tools and sets of concepts and expectations derived from the quite unambiguous survey findings of the 1940's and 1950's.[5] Since then, times have changed: machine-readable voting and census data are routinely available, as are the major surveys since the 1930's; teams of scholars now unite diverse capabilities into single research thrusts; and easy-to-use software packages enable even novices to employ sophisticated statistical routines.[6]

While partial regression coefficients and probit estimates have replaced the simple percentages and correlations used in the early studies, they have not seriously undermined their central analytic findings.[7] To be sure, these more recent efforts have not been fruitless exercises. By using better estimation procedures and covering a larger geographic area, they have expanded our knowledge of past political behavior. Some scholars have entered caveats and reservations; others, invoking Marx, but often forgetting what they might have known of his writings, have disingenuously reinterpreted ethnoreligious conflict as class conflict. But for the most part the expansion of knowledge that has occurred has followed the predictable lines demarcated by the earlier studies.

We need not tarry to summarize the state of knowledge, for that has been cogently done by Professor Silbey and, I think, imaginatively expanded by Professor Jensen. Instead we can begin by reflecting on the magnitude of the

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change that has occurred in our understanding of past politics. The papers by Professors Silbey and Jensen symbolically capture the essence of the transformation. An intellectual generation ago, two papers arguing that religious values were somehow important, let alone fundamental, to mass politics — if presented at all — would have been received with a skepticism probably verging on genteel derision. Yet notice that these papers do not *argue* that point; they take it for granted. They do not ask *whether* ethnoreligious values were important to past political battles, but rather *how* they operated to that effect.

Taken collectively, the voting behavior studies have created a new interpretive framework within which to view mass political behavior and party battles. The radical departure of the early 1960's has become the standing orthodoxy of the early 1980's. In effect, we again run the danger of demonstrating the applicability of the Renaissance adage: we have built a new palace. And the thought of this new palace threatens to become as removed from that of the public square as it was in Machiavelli's day.

The source of this emerging danger lies in the tendency to view the full course of American politics as the late-nineteenth century writ large. Political historians have been strongly tempted to interpret both earlier and later politics within the frameworks generated by the intensive studies of post–Civil War party combat. The temptation is to construct for American political history an ethnoreligious synthesis whose encompassing character rivals Turner's frontier thesis.[8] We should strongly resist that temptation; for, in yielding to it, we would push American political history into a static and artificial mold. We would ignore the ways in which group subcultures have changed over time, and the necessary adjustments that these changes have produced in their political outlooks.[9] We would not deal adequately with the ways in which parties themselves have been transformed, or with the alteration of their roles within the larger political process. In short, such an interpretation, by emphasizing continuity across time in the relationship between religion and politics, would preclude understanding the dynamic nature of interpenetration and, therefore, the adaptive — perhaps even developmental — character of American politics.

Certainly Professors Jensen and Silbey are sensitive to the danger and alert us to it. Professor Jensen, for example, observes that "in the twentieth century the connections between religion and politics weakened greatly." And Professor Silbey explicitly points out that "contemporary [tribal] polarization is not as clear as it was."[10] Both statements are accurate, but neither goes far enough. Indeed, these statements quietly sidestep the essential difference between the late-nineteenth century and other historical periods.

We can most conveniently bring that difference into focus by noticing the characteristics of late-nineteenth-century politics and how they were interrelated. Then the two major parties mobilized the support of distinctive — but mutually antagonistic — coalitions of ethnoreligious groups. Party differences were expressions of these irreconcilable ethnoreligious conflicts; elections became the secular analogs of religious wars; and most citizens came to see party-candidate

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alternatives as all-or-nothing options. Under these conditions, partisanship was an intensely felt and behaviorally stable attachment. Most men, in other words, were party voters, who neither split their ballots, nor defected to the major opposition, nor gave their votes to minor parties. Moreover, because they could readily perceive how election outcomes would affect their daily lives, most men voted in most elections.[11]

It is important to notice that the separate components of this picture fit together. The strong and stable partisanship of the period was a product of the linkages between ethnoreligious values and party oppositions. In turn, the widespread diffusion of strong party norms among the mass electorate made the late-nineteenth century preeminently a partisan era. Parties not only commanded the psychological and behavioral loyalty of the overwhelming majority of voters, they also controlled the conduct of elections and virtually monopolized the flow of political information. Parties dominated the processes of recruiting candidates and mobilizing voters, and thus they were able to exert discipline over their office-holders and thereby forge tangible links between their elected government and their electorate. As a result, the citizenry's strong and positive orientations toward parties were reinforced by the accurate perception of them as effective instruments of collective social action.

It also needs to be noticed that the dominant social-structural characteristics of the period operated to reinforce and perpetuate these linkages between group subcultures and political parties.[12] It was a society marked by relatively low levels of functional interdependence and flow of information. While it was a polyglot society, it was one composed of small and relatively homogeneous groupings deployed into well bounded and psychologically isolated communities. It was a world of close ties to family, church, and community. The dominant social conditions were conducive to the maintenance of group cohesion and as well to the maintenance and transmission of party identifications that were inextricable components of group political cultures. Under these political and social-structural conditions, the processes of political socialization operated effectively, and among contemporaries "it was expected as a matter of course that partisan politics would descend from sires to sons with unbroken regularity."[13]

When we look at the late-nineteenth century, we see a set of political characteristics that operated in tandem and that were reinforced by the predominantly localistic character of the society. Parties and politics, as a result, played quite different roles in the lives of nineteenth-century citizens than they do in our own day. Partisan attachments now are to secularized, individualist cadre parties, to limited liability associations that do not greatly intrude upon the lives of their adherents. Party identifications, like party activities, have become "seasonal" affairs, often detached and remote from daily life experiences. In that earlier and less complex society, party identifications were commitments to "political churches," to secular formations that functioned very much as western European parties of religious integration do, with a capacity to absorb the total life of their adherents in a comprehensive political subculture. Quasi-confessional identifica-

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tions of this sort stimulated the participation of party members and immunized them against electoral appeals both from their traditional partisan opponents and from new political movements.[14] Moreover, politics occupied a great share of the individual's life, because political matters were not complex, intangible, and remote — as they now are — but simple, concrete, and directly related to the concerns of daily life. Ethnoreligious and political communications reinforced each other and created a party system whose cleavage line reflected this absorbing, extensive, and energizing social conflict.

That is the critical and essential feature of late-nineteenth-century politics: ethnoreligious conflict structured the prevailing party system. It was not simply a period in which there existed some partisan differences in the voting behavior of religious groups; it was one in which ethnoreligious conflict shaped the basic cleavage line of the political system. The contending religious and ethical values in which that conflict was rooted were the central features of that era's party and political systems. When we look at the grassroots manifestations of that conflict, they appear trivial and anachronistic; for they involved struggles over such matters as prohibition, Sunday-closing statutes, parochial schools, and language laws. But we need to see the forest as well as these individual trees. Viewed from a system perspective, these battles were of profound significance, for they involved nothing less than establishing the terms and conditions under which national integration would be achieved. One set of groups insisted on what amounted to an unconditional surrender, a cultural homogeneity to be attained by using public power, if necessary, to coerce compliance with their conceptions of the good society and right behavior. Other groups valued cultural pluralism and resisted these imperialistic encroachments. The crucial point is not that these differences existed, or even that they prompted some members of the opposing groups to behave in particular partisan ways. The crucial point is that this conflict structured the Democrat-vs.-Republican party system of that era. Therefore, party battles were central features of the major policy issue confronting the polity at that stage of its development: how to integrate a polyglot population into a viable nation-state.[15]

The manner of resolution of that conflict was uniquely American. Only the late-nineteenth-century American political context, dominated by essentially constituent parties, could allow the cultural pluralists to have lost the battle though they won the war. The details of this ideational transformation of the Republican party have been laid out elsewhere.[16] Here it is only necessary to notice that the Republican party that attained political hegemony in the mid-1890's was no longer committed to a cultural homogenization of the society. Its acceptance of cultural pluralism, however tenuous and tacit in some instances, marked the end of the struggle over the terms of national integration. Certainly, not all groups accepted that resolution with equal equanimity. The anti-German furor of the late 1910's, the Klan's anti-Catholic crusade in the 1910's and 1920's, and the advent of national prohibition attest to the fact that the cultural imperialists did not fold their tents and steal quietly into the night. Ethnoreligious conflict persisted, as did

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its political salience, and its grassroots forms had not changed all that much from those of the late-nineteenth century. What was different was that it no longer structured party oppositions; Democrats and Republicans no longer so unambiguously represented the opposing sides of the conflict. It is well to remember, for example, that the anti-German furor was ignited by the policies of a Democratic administration; that the Klan was a divisive question with the Democratic party; and that national prohibition went into effect under a Democratic administration and, more importantly, as the result of considerable bipartisan legislative support.[17]

These changed leadership behaviors had their counterparts at the mass level. In the late-nineteenth century attitudes expressed on prohibition referenda neatly dovetailed with party selections. In 1882 in Iowa, for example, virtually none of the Democratic voters, but 75.2% of those who cast Republican ballots, voted for prohibition. In 1916 only 48.6% of Iowa's Republican voters supported that year's prohibition measure, but so did 40.4% of those who cast Democratic ballots. The change was even more dramatic in Michigan and Nebraska, where majorities of the 1916 Democratic voters, but less than half of the Republicans, voted in favor of prohibition.[18]

Needless to say, there were exceptions. Ethnoreligious conflict seems to have remained alive and well in New York and Massachusetts. And in the 1910's and 1920's it seems to have continued to shape the party oppositions in those states, aided no doubt by the statewide candidacies of Democrats who were Irish and Roman Catholic. The 1928 election produced its much chronicled "Al Smith Revolution" in the nation's major cities, a mobilization of immigrant and immigrant-stock voters in support of the Democratic presidential candidate. Larger and less noticed was a "Hoover Revolution," a pro-Republican mobilization of native-stock and Protestant voters in small and medium-sized cities.[19] But these cases stand out precisely because they are distinctive when compared with the normal voting patterns of the period. In the late-nineteenth century such cases and the voting patterns they elicited might have gone unnoticed because they were the norm.

After about 1900, in other words, we can still detect lingering traces of the older patterns of religious-group partisanship. And when the election-specific stimuli were unusually strong and unambiguous, those patterns sharpened and stood out even more clearly. But they were residual traces of earlier party systems, behavioral artifacts testifying that human beings neither readily forget their histories nor facilely alter their habitual behaviors. No longer does their appearance inform us significantly about the character of the party system or about the nature of the conflict that structured it. The resolution of the integration debate shifted the policy agenda at the system level and rendered the political expression of grassroots ethnoreligious conflict essentially irrelevant to a new debate over the distribution of resources and values within a capitalist economy.[20]

Of course, when it was to their advantage, politicians continued to tap and mobilize such conflict and channel it into election-day support. And ethnoreli-

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gious group leaders continued to use their roles within the subcultural community as avenues to political careers and upward social mobility. But these and other vestiges of earlier practices and behaviors were peripheral to the policy agenda; they were ritualized sideshows, irrelevant to the policy-making process. As citizens came to perceive that reality, they came as well to devalue parties that no longer operated as instruments of collective social action, and the rates of abstention from active participation in the electoral process increased correspondingly.

Finally, there was one further consequence of the party-system transformation of the 1890's and the aftershocks that it produced on mass political culture. No longer was there any national political party defensive of *laissez faire* values.

In the late-nineteenth century, "personal liberty" was more than a voter mobilization ideology for the Democrats. It was more than a slogan to remind that party's varied support groups of their reasons for being Democrats, and more than an empty rhetorical device used to criticize the behavior of the opposition party. It was as well a guide to the policy behavior of the Democratic party in government.[21] An assertive, positive government was as repugnant to Democrats in office as it was congenial to Republican elites. Grover Cleveland's response to the depression of the 1890's — his insistence that the government's sole responsibility was to maintain its own fiscal solvency — was not simply a personal reaction. It was a party reaction, consistent with the rhetorical traditions and past behaviors of the Democratic party in government.

However, the depression of the 1890's was a turning point for the Democrats. It created the set of conditions that led to the displacement of the party's traditional leadership by a new generation of national leaders, composed mainly of southern and western agrarians. This change in personnel was accompanied by a change in the party's ideational orientation. The Democratic version of *laissez faire* yielded to an agrarian and small-producer version of positive government. Thereafter, Democrats and Republicans did not debate, as they had in the nineteenth century, *whether or not* government should be powerful, assertive, and intrusive. Instead, their policy disagreement was constrained by a broad consensus supportive of strong and durable public institutions that penetrated the society and intruded upon the lives of its citizens. Within the context of that consensus, of course, they disagreed fundamentally over the specific applications of government power, over which groups should have access to it and benefit from its use.

The concrete referents of partisan dialogue have changed considerably since the turn of the century. Economic and social transformations have reduced the size and importance of older groups, while prompting the crystallization of newly defined interests and the consequent formation of new groupings. While the names of the group actors have changed, the character of party struggle remains essentially the same. Parties battle for control over powerful and penetrative governmental institutions, and their shared commitment to the maintenance and aggrandizement of those institutions forecloses representation to groups whose values prescribe a maximization of individual options. To such citizens, the major party alternatives of our own day simply represent choices between different

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means to the same end — the infringement of human liberty. It does not matter materially whether that infringement results from affirmative-action quotas and a multitude of other wide-ranging bureaucratic regulations, or from the construction of a military leviathan and an unprecedented concentration of private economic power. Given such party-defined alternatives, partisanship becomes irrelevant; for, no matter which party wins elections and controls the government, the outcome remains the same — the continued decay of individual freedom.

NOTES

1. Karl Mannheim, *Ideology and Utopia: An Introduction to the Sociology of Knowledge* (1929; New York: Harcourt, Brace, and World, Harvest Books, n.d.), p. 63.
2. The *locus classicus* is Angus Campbell *et al.*, *The American Voter* (New York: John Wiley & Sons, 1960), which analyzes 1952 and 1956 survey data. Also see Angus Campbell *et al.*, *Elections and the Political Order* (New York: John Wiley & Sons, 1967). For an alternative view, see V. O. Key, Jr., *The Responsible Electorate* (Cambridge, Mass.: Harvard University Press, 1966).
3. The subfield of political socialization also became a growth enterprise; for an analytic overview, see Richard E. Dawson, Kenneth Prewitt, and Karen S. Dawson, *Political Socialization*, 2nd ed. (Boston: Little, Brown & Co., 1977); and also see M. Kent Jennings and Richard G. Niemi, *Generations and Politics: A Panel Study of Young Adults and Their Parents* (Princeton, N.J.: Princeton University Press, 1981).
4. For an outline of the developments, see Allan G. Bogue, "Recent Developments in Political History: The Case of the United States," in *The Landon Project: Interdisciplinary Studies on the Historical Evolution of Southwestern Ontario*, 2nd annual report, 1977–1978 (London, Ont.: issued by University of Western Ontario), pp. 113–55; and for a more accessible, but earlier exposition, see *idem*, "United States: The 'New' Political History," in *The New History: Trends in Historical Research and Writing since World War II*, ed. Walter Laquer and George L. Mosse (New York: Harper & Row, 1967), pp. 185–207.
5. I include among the early studies: Lee Benson, *The Concept of Jacksonian Democracy: New York as a Test Case* (Princeton, N.J.: Princeton University Press, 1961); Ronald P. Formisano, *The Birth of Mass Political Parties: Michigan, 1827–1861* (Princeton, N.J.: Princeton University Press, 1971); Richard Jensen, *The Winning of the Midwest: Social and Political Conflict, 1888–96* (Chicago: University of Chicago Press, 1971); Paul Kleppner, *The Cross of Culture: A Social Analysis of Midwestern Politics, 1850–1900* (New York: The Free Press, 1970); and Frederick C. Luebke, *Immigrants and Politics: The Germans of Nebraska, 1880–1900* (Lincoln, Neb.: University of Nebraska Press, 1969). There were also a number of journal articles that would qualify for inclusion. Jensen's formal training in mathematics made him an exception among the early practitioners of the "new political history."
6. Country-level voting and census data from 1824 through 1980 are available from the Inter-University Consortium for Political and Social Research, University of Michigan, as are the SRC/CPS national elections surveys. The AIPO surveys (Gallup Polls) are available from the Roper Center, University of Connecticut. The most usable of the software packages is SPSS, whose initial release was in 1970; see Norman H. Nie *et al.*, *SPSS: Statistical Package for the Social Sciences*, 2nd ed. (New York: McGraw-Hill, 1975).
7. I will make no effort here to enumerate the later studies. Much of the argument concerning the substantive findings has dealt with their statistical underpinnings; for an overview of the debate over techniques, see William G. Shade, " 'New Political History': Some Statistical Questions Raised," *Social Science History* 5 (Spring 1981): 171–96.
8. Notice the time period covered by the works cited in note 5. For a bold and imaginative effort to construct such a synthesis, see Robert Kelley, "Ideology and Political Culture from Jefferson to Nixon," *American Historical Review* 82 (June 1977): 531–62; and also see the "Comments" on Kelley's essay by Ronald P. Formisano, *ibid.*, pp. 568–77.

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9. For a useful general formulation, see Vladimir C. Nahirny and Joshua A. Fishman, "American Immigrant Groups: Ethnic Identification and the Problem of Generations," *Sociological Review* 13 (1965): 311–26.
10. Richard Jensen, "Religion, Morality, and American Politics," *Journal of Libertarian Studies* 6, nos. 3–4 (Summer/Fall 1982): 328; and Joel H. Silbey, " 'Let the People See': Reflections on Ethnoreligious Forces in American Politics," *ibid.*, p. 340.
11. For the detailed evidence supporting this characterization, see the works cited in note 5; and also see Paul Kleppner, *The Third Electoral System, 1853–1892: Parties, Voters, and Political Cultures* (Chapel Hill, N.C.: University of North Carolina Press, 1979), and the supplementary data in *idem*, "Partisanship and Ethnoreligious Conflict: The Third Electoral System, 1853–1892," in *The Evolution of American Electoral Systems*, by Paul Kleppner *et al.* (Westport, Conn.: Greenwood Press, 1981), pp. 113–46.
12. Jerome M. Clubb, William H. Flanigan, and Nancy H. Zingale, *Partisan Realignment: Voters, Parties, and Government in American History* (Beverly Hills, Calif.: Sage, 1980), pp. 278–83, present these social-structural characteristics as virtually sufficient conditions explaining the dominant mode of ethnoreligious politics; and Lee Benson and Joel H. Silbey, "The American Voter, 1854–1860 and 1948–1984" (paper presented at the Convention of the Organization of American Historians, New York City, April 1978), offer an argument that by omission borders on the same conclusion. For an analysis that incorporates these conditions and assigns them their properly subordinate position as contributing factors, see Paul Kleppner, *Who Voted? The Social and Political Dynamics of Electoral Participation, 1870–1980* (New York: Praeger, 1982), pp. 28–54.
13. Edward W. Barber, "The Vermontville Colony: Its Genesis and History, With Personal Sketches of the Colonists," *Michigan Pioneer and Historical Collections* 28 (1900): 236–37. Also see Neal Dow, *The Reminiscenses of Neal Dow, Recollections of Eighty Years* (Portland, Me.: The Evening Express Publishing Company, 1898), p. 126.
14. Walter Dean Burnham, "Political Immunization and Political Confessionalism: The United States and Weimar Germany," *Journal of Interdisciplinary History* 3 (Summer 1972): 1–30. For relevant general formulations, see William N. McPhee and Jack Ferguson, "Political Immunization," in *Public Opinion and Congressional Elections*, ed. McPhee and William A. Glaser (New York: The Free Press, 1963), pp. 155–79; and Seymour Martin Lipset and Stein Rokkan, "Cleavage Structures, Party Systems, and Voter Alignments: An Introduction," in *Party Systems and Voter Alignments: Cross-National Perspectives*, ed. Lipset and Rokkan (New York: The Free Press, 1967), pp. 1–64, and esp. pp. 15–16 for the immunizing capability of parties of religious defense.
15. For the framework, see Gabriel A. Almond and G. Bingham Powell, Jr., *Comparative Politics: A Developmental Approach* (Boston: Little, Brown & Co., 1966), pp. 34–41; Lipset and Rokkan, "Cleavage Structures, Party Systems, and Voter Alignments," pp. 1–64; and J. Rogers Hollingsworth, "The New Politics and American History," in Lee Benson *et al.*, *American Political Behavior: Historical Essays and Readings* (New York: Harper & Row, 1974), pp. 409–23.
16. Jensen, *Winning of the Midwest*, pp. 269–309; Kleppner, *Cross of Culture*, pp. 316–68; and *idem*, "Coalitional and Party Transformations in the 1890s," in Seymour Martin Lipset, ed., *Party Coalitions in the 1980s* (San Francisco: Institute for Contemporary Studies, 1981), pp. 87–105.
17. On these matters, see David Burner, *The Politics of Provincialism: The Democratic Party in Transition, 1918–1932* (New York: Knopf, 1968); Frederick C. Luebke, *Bonds of Loyalty: German Americans and World War I* (DeKalb, Ill.: Northern Illinois University Press, 1974); and Paul Kleppner, "The Demise of Ethnocultural Politics; Parties and Voters, 1896–1920" (paper presented at the Convention of the Organization of American Historians, San Francisco, Calif., April 1980).
18. In Michigan 60.5% of the Democratic voters and 49.3% of the Republicans supported prohibition, and in Nebraska the figures were 52.0% of the Democrats and 46.1% of the Republicans. In Michigan in 1887 and Nebraska in 1890 a majority of the Republican voters (67.0% and 75.4%, respectively) cast ballots for prohibition, while virtually none of the Democrats did. For additional evidence and discussion of the behavioral indicators of this type of transformation at the mass level, see Kleppner, *Who Voted?* pp. 66–82.

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19. Samuel Lubell, *The Future of American Politics,* 3rd ed. (New York: Harper & Row, 1965), pp. 43–55; Walter Dean Burnham, "The System of 1896: An Analysis," in Kleppner *et al.*, *Evolution of American Electoral Systems,* pp. 182–83; and Gary Klesner, "An Examination of Changes in Voter Turnout in 1928" (seminar paper, Northern Illinois University, 1981).
20. On the character and policy agenda of the fourth electoral system, see Burnham, "The System of 1896," pp. 147–201.
21. For examples, see Ballard C. Campbell, *Representative Democracy: Public Policy and Midwestern Legislatures in the Late Nineteenth Century* (Cambridge, Mass.: Harvard University Press, 1980); and William Gerald Shade, *Banks or No Banks: The Money Issue in Western Politics, 1832–1865* (Detroit: Wayne State University Press, 1972).

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The Opponents of Public Education: New York State, 1870–1880*

by Gerard A. Postiglione

School of Education
University of Hong Kong

I

A significant amount of opposition surrounded the development of state supported public secondary and higher education in New York State throughout the eighth decade of the nineteenth century. Opposition appeared within various sectors of the social structure.[1] However, this paper will concern itself with the opponents who occupied a political, or politically influential position. They include two governors of the State, a Regent of the State University, a president of a university, a Superintendent of Public Instruction, and the editor of a scholarly journal.

The period just preceding the 1870's in New York State was politically colored by the Radical Republicans' rise to power during Reconstruction. As 1870 approached, this group found themselves in fierce competition with the reemerging Democratic party for control in state government. The Radical Republicans, under the leadership of the newly elected governor Reuben E. Fenton, had supplanted their old Whig rivals and instituted a platform calling for progressive reform. A prominent scholar of this period, James C. Mohr, characterizes their position as follows: "The Radicals' approach to reform embodied both a faith that institutional change could produce social change and a belief that the massive problems of postwar New York could best be handled by the central government at Albany."[2] A vast program of civil and institutional reform accompanied their political reign. With respect to education specifically, three major steps were taken: the founding of Cornell University in 1865, the creation of four normal schools for teacher training in 1866, and the passing of the Free School Law of 1867.

By the end of 1867, the power and influence of the Radical Republicans began to falter slightly and they increasingly found themselves in a deadlock with the resurgent Democrats. The deadlock ended in 1869 when the Democrats, for the first time since the 1840's — when Jacksonian Democracy was predominant —

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won majorities in both houses of the legislature. Thus the 1870's was ushered in by the Democrats, who gave the state government an almost completely different orientation than had the Radical Republicans. The approach of the Democrats was characterized by Mohr as "virtually the direct opposite" of that developed by the Republicans.

> When the Radicals had favored centralization and the imposition of rationalized administration from above, the Democrats counterattacked with a program based upon decentralization and local autonomy. Where the Radicals had tried to expand the role of the state and the power of officials at Albany to meet the needs of a rapidly urbanizing and industrializing society, the Democrats, as befitted the state's surrogate Southerners, championed "home rule" and defended those governmental units closest to the people as the most appropriate agencies to solve the people's problems.[3]

As the Democrats gained power in 1870, their political posture, which in some ways still hinged on the precepts of Jacksonian Democracy, was reflected in their policy toward state involvement in public education. The scope of support for state controlled and subsidized schooling varied according to the political party in power in the governor's office or the legislature, and the 1870's in New York State, a period of Democrat ascendency, was marked by an essentially *laissez faire*, minimal government philosophy which expressed itself in the field of education in efforts to reduce public expenditure for schooling, and to exclude the state from the business of higher education entirely. This program invoked the belief that the voluntary system was adequate to the needs of society for schooling beyond the primary level.

Prior to examining the ideas of the opponents of public higher education, a brief sketch of the development of higher education in New York State before 1870 may serve as a useful background. Of course there are many social, economic, religious, and political factors which are critical to a complete understanding of the dynamic role which education played in the society. Unfortunately the scope of this paper requires the omission of these important factors.

Before 1870, higher education was considered anything beyond the level of the common school. This included secondary schools, academies, high schools, normal schools, and colleges. Legislative provisions for education began on May 1, 1784, with the creation of a corporation called the Regents of the University of the State of New York whose principal function was to establish and control schools and colleges.[4] The powers of the Regents included chartering of colleges and academies, the visiting and inspecting of the institutions, and the granting of financial aid.[5] In 1790 an act was passed "placing at the disposal of the Regents, several large tracts of land, and in the interim until this should become productive of revenue, the sum of one thousand pounds annually was appropriated for the needs of the academies and colleges."[6] In 1813 an act was passed "directing the sale of certain lands for the benefit of the academies," which, together with certain later acts, established the literature fund permanently devoted to the rise of the academies by the state constitution of 1846.[7] In 1838 a

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fund composed of the excess revenue apportioned to the State of New York by the United States Congress, was made available for educational purposes; and part of the income from it was contributed by the state to the support of academies. An act passed in the same year granted the Regents $28,000 annually from the revenue of this fund, which was known as the United States Deposit Fund, to be apportioned to the academies subject to visitation.[8] The Constitutional Convention of 1846 provided that this fund, together with the literature fund, would be preserved inviolate.[9]

Following at least a decade of growing concern for the education of teachers for the common schools and because of an increasingly insufficient number of teachers being provided by the academies, the first normal school was established on May 7, 1844. It was to be located in Albany and subject to the supervision and management of the Superintendent of Common Schools and the Regents.[10] In 1866, four new normal schools were established by an act of the legislature.[11] In addition, the Office of the Superintendent of Instruction was established in 1854 to replace the abolished office of the Superintendent of Common Schools. This new office was given the function of visiting schools and academies, thus duplicating a continuing responsibility of the Regents.[12]

By 1840 there was a growing interest in the establishment of union schools.[13] Union schools were formed by the consolidation of a common school with an academical department. Academical departments, later referred to as high schools, evolved from the introduction of higher subjects into the common schools. A union school could also be established by the consolidation of a common school with a former academy transformed into an academical department.[14] Due to increasing financial cost, many struggling academies chose this course of action.[15] Many districts became interested in the union school arrangement and began petitioning the legislature for permission to consolidate. After granting permission to many districts, in 1853 the legislature passed an act to consolidate the previous acts pertaining to union schools. This act was called the Union Free School Act.[16] The transition of academies to public high schools was expedited by this act of 1853 and by subsequent acts of 1864 and 1867.[17]

In 1867 the Free School Law was passed applying to common school education.[18] It had evolved from the Free School Acts of 1849 and 1851 and had commanded significant opposition, but was nevertheless passed.[19] Although the free school program was initially intended for the common schools, the idea of extending it to secondary schools, academies, and colleges was gaining popularity.[20] Rigorous debates over the issue ensued during the State Constitutional Convention of 1867 and ushered in a long period of controversy surrounding the state's role in the support of secondary and higher education.[21]

I. Abram B. Weaver

Opponents of public education introduced into New York State Assembly in 1869 "an act to abolish the Board of Regents of the University and to establish a State Board of Education."[22] The leading proponent of this measure was Abram B.

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Weaver, Superintendent of Public Instruction. Weaver was an outspoken foe of the Regents and of public secondary and higher education. Weaver's battle for the abolition of the Regents was symbolic of his disagreement with the then Chancellor V. L. Pruyn over the issue of state supported, public secondary and higher education.

"The legislature was more impressed with the views of Superintendent Weaver than with those of the Regents. In 1870, for the first time in sixteen years, Democrats were in control of the Assembly and Senate and the Governor's office as well. An act to create a department of education, and to reorganize the board now known as the Regents of the University of the State of New York was introduced in the Assembly just two weeks short of adjournment."[23] On adjournment day the Assembly acted unanimously to approve a bill that had emerged from the Senate in strict accord with Weaver's recommendations. Once the legislature had acted, it was up to Governor John T. Hoffman to decide whether it would become law.[24]

Governor Hoffman, often recognized as the personal representative of the Tweed ring, was governor from 1869 to 1872.[25] William Tweed had become a State Senator in 1867 and put Hoffman forward for the governorship of the State in 1869.[26,27] Aided by the national Democratic drift of that year, Hoffman, an outwardly respectable man, won the gubernatorial election.

As governor, Hoffman urged the legislature to "do whatever may be necessary to foster the educational interests of the state." Concerning the common schools Hoffman remarked, in 1870, "no tax should be paid more cheerfully than that which enables all, without reference to station or condition, to acquire the rudiments of a good English education,"[28] and, a year later, "I am sure the legislature needs no recommendations from me to extend to our school system the most liberal encouragement."[29] Similarly, in 1872 he made a request to the legislature: "I ask for the schools the most liberal legislative encouragement."[30]

These words of Governor Hoffman were not specifically directed to the question of secondary and higher education and cannot be said to provide much of an indication of how he would react to signing the 1870 bill. Regent Chancellor Pruyn and Regent Erastus Benedict argued with Governor Hoffman against the bill and Hoffman gave the measure a pocket veto for reasons he declined to state. Whatever his reasons may have been, Hoffman's action prevented the establishment of a state board of education whose chief characteristic was its "nearness" to the people.[31] More importantly, it acted to hinder Abram Weaver in his battle against state supported public secondary and higher education.

In his annual report as Superintendent of Public Instruction in 1870, Weaver stood forth as an opponent of public secondary and public higher education:

> Should the academies be made free? . . . However great may be the personal advantage of an education, the primary object of the state, in bestowing it, is not to benefit individuals as such, but to qualify them properly for their relations and duties to each other as members of the same community. The true theory is, I apprehend, that each citizen has an interest in the education of

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> all others, such as to justify the taking of private property to support public schools. Public instruction is a governmental measure, adopted to support the security, good order and common welfare of society and thus to preserve the integrity of the state. But for the community of interest, the state would have no better right to take the property of one citizen to educate another, than it would to give it to him direct.[32]

Weaver's argument avoided condemnation of the free common schools, for which he believed there is a fundamental state obligation. But as to higher levels of education, he argued that:

> Advanced education is not, in my judgment so essential to the public ends as elementary instruction, and consequently the obligation to provide for it is not so fundamental as imperative. Nor is it clear to my mind that public considerations would thereby be subserved in proportion to the extent of instruction, beyond the course now authorized, though in many cases not pursued in the common schools.[33]

At the urging of the University Convocation (composed of the Regents, college officials and principals of academies),[34] the legislature passed a General Tax Law in 1872 which levied a tax of one-sixteenth of a mill in support of academies, as secondary schools under the Regents. Since the academies were unable to meet the competition from the union free schools of the same grade, the measure was of crucial importance. The amount appropriated by this act was $125,000 and, with an income of $40,000 from permanent funds, this gave many academies new hope for continued existence. This measure was vigorously opposed by many, including Weaver:

> But if in opposition to these considerations, and contrary to the formal policy of the state, it should be determined to levy, for academic instruction, a third tax in addition to both the general and local taxes now raised for public schools, there is no reason or justice in providing for that class of instruction more liberally than for common school education. Such a discrimination in favour of higher education, against those who cannot avail themselves of its advantage, is not only a wide departure from the policy herebefore pursued, but is manifestly unjust.[35]

The tax was discontinued in 1874.

As the final term of Governor John Hoffman came to a close, Weaver continued to occupy the position of Superintendent of Public Instruction. He remained in that post until 1874, the year following the financial panic of 1873 which saw the number of private academies dwindle, to be replaced and surpassed in number by the union free high schools.[36]

Republican John A. Dix took office as governor in 1873. A noted historian has remarked that Dix, "with a fine record in the Civil War and long service in public office, made a rather colorless governor".[37] The term "colorless" can also be applied to Dix's first annual messages on education. Aside from the common practice of presenting the annual statistics, his annual message of 1873 makes no mention whatsoever concerning the schools of the state.[38] In the following year,

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Dix's message did contain remarks concerning institutions of teacher training: "Whatever is done to elevate and improve the institutions in which teachers are trained, will tend directly and positively to advance the schools in which they teach."[39] Ironically, Dix made reference neither to the Compulsory School Law which was to be passed during his second year as governor, nor to any opposition the bill may have encountered. Also conspicuously missing was any suggestion of the discontinuance in 1874 of the General Tax Law of 1872.[40] In this passage taken from his 1874 annual message, Dix mentions only the previous appropriations:

> The increased appropriations lately made to these institutions are greatly stimulating the work of both teacher and scholars in all departments of institutions. They are especially felt in the classes for the preparation of teachers for the common schools, there being an increase of at least thirty percent in the number of such teachers now being trained, as compared with former years. This result is regarded by the regents as most encouraging; for with all that is done in the normal schools, the academies must continue to a great extent to furnish the teachers for the common schools, especially in the rural districts.[41]

II. Samuel J. Tilden

In 1874, the Democrats were successful in getting Samuel J. Tilden elected to the governor's office. Tilden in many ways represented the great libertarian tradition of the Democratic party in New York. During his youth he had become a dedicated supporter of General Andrew Jackson for president and was an outspoken supporter of minimal government and *laissez faire* economics. Tilden's opposition to bureaucratic centralism was evident in his writings and speeches. In 1871 he remarked: "I oppose centralism because it is incompatible with civil liberty. Forty millions of people, guided by a single hand, would sweep over all dissent and all resistance of isolated or unorganized individuals."[42] Tilden spoke of the federal government in proclaiming the evils of centralism: "The Federal Government is drifting into greater dangers and evils. It is rushing onward in a career of centralism, absorbing all government powers and assuming to manage all the affairs of human society."[43] And concerning education he warned against the expanding role of government: "It is going to usurp control of all our schools and colleges."[44]

Tilden nevertheless remained hopeful that a restoration of democracy and individual freedom would come about.

> A change of men is necessary to secure a change of measures. The opposition is being matured and educated to take the administration. The Democracy with the tradition of its best days, will form the nucleus of the opposition. . . . We will go forward until a political revolution shall be worked out and the principles of Jefferson and Jackson shall rule in the administration of the Federal Government.[45]

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In his first annual message as governor, Tilden spoke positively in reference to higher education and seemed to favor a type of voluntaryism.

> The condition of the colleges and academies, subject to the visitation of the Regents of the University, is very satisfactory. . . . By the wise liberality of individual citizens, the endowments and appliance of several of these institutions have during the last years been largely increased and their means of usefulness greatly extended. The number of scholars in attendance upon the academies has increased and the standard of scholarship has upon the whole considerably advanced. These institutions, while they prepare students for admission to the colleges, are also designed to fit another class for immediate entrance upon the practical duties of life; and thus complementing the work of the common schools, form an important part of the educational institutions of the state.[46]

During his first year in office, considerable controversy surrounded an education-related bill proposed by Tilden. For his support of it he was later referred to as "an enemy of the state schools."[47] One critic remarked that Tilden "approved a new law which virtually destroyed the settled status of the common schools of the state."[48] Tilden's bill (enacted in 1875) was entitled "an act to incorporate the sisterhood of Grey Nuns in the state of New York."[49] Repealed under criticism three weeks after it was signed, the bill would have granted certification to teach in the common schools to the graduates of the Roman Catholic Seminary of the Grey Nuns. This was viewed as opening the door to the involvement of Catholic clergy and religious in public schools.[50]

The state had for many years provided funds to the academies for the instruction of potential common school teachers during one-third of the academic year. An annual appropriation of $18,000 came from the U. S. Deposit Fund for this purpose.[51] During Tilden's second year as governor, a bill was introduced to increase the appropriation from $18,000 to $40,000.[52] The bill passed both houses of the legislature but, for whatever reason, failed to receive Governor Tilden's signature. Some speculated that Tilden was too interested in his own campaign for the Presidency to take proper care of his duties as Governor. It may also be that Tilden, and his comptroller, Lucius Robinson, who had earlier opposed the bill, conspired to allow it to fail by a pocket veto.

III. Lucius B. Robinson

Lucius B. Robinson succeeded Samuel Tilden as Governor of New York in 1877. Robinson has been characterized as "an executive of remarkable force, sensitively obedient to the principles of honest government and bold in his utterances."[53] He carried on Tilden's programs of economy and reform.

As 1877 approached, opposition to public secondary and higher education had mounted significantly. With the outspoken Abram Weaver no longer in the influential position of Superintendent of Public Instruction, the opposition was

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now led by Governor Robinson. In his first message as governor, Robinson wasted no time in declaring his position:

> It seems to me to be a clear violation of personal right for the states to go beyond [the common schools] and levy taxes to support free academies, high schools or colleges. . . . This should be left to individual effort from which better results always come than from any amount of donation from the state.[54]

Skeptical of any public schooling beyond the common school level, Robinson challenged the worth of the already established state normal schools by arguing that "many pupils never ended up following the profession anyway".[55] That many graduates of the normal schools never taught in the common schools had also been a frequent matter of concern to the legislature. As early as 1870, the Assembly had adopted a resolution directing the Superintendent to furnish them with the number and names of young men educated at the state normal schools, who had failed to keep their pledge to teach, made on entering such schools.[56]

In 1879 Robinson confirmed his discontent with the normal schools and threatened their continued existence if reform did not come about. He commented:

> So far as I can learn, the normal schools established in various parts of the state are, with two or three exceptions, wholly useless, and fail almost entirely to accomplish the objects for which they were established and for which the state is annually paying large amounts of money from the treasury. I recommend an inquiry into the workings of these institutions and a discontinuance of all those which fail to accomplish the purposes of their establishment.[57]

Robinson noted that the large amount of money raised through state taxes for education was "double the sum required to pay the entire expense of state government, executive, legislative, judicial, military, civil,"[58] and warned that "this is liable to lead to abuse."[59] Robinson proceeded to challenge the principle of support of high schools by general taxation:

> In my judgment, a very great wrong has already grown up in conection with our otherwise excellent system. It lies in the principle of applying large amounts of the moneys raised by taxation, to support the high schools, and instruction in all the sciences and higher branches of study required in the learned professions. I can find no excuse for raising money by general taxation for such purposes. . . . Nine in ten of those educated in the so called high schools at public expense would far better pay their own bills than have them paid by the state.[60]

Speaking of the injustice of public education beyond common schools, Robinson argued: "When we go beyond this and take from one man the money necessary to educate the children of another in arts and sciences, we perpetuate an act of injustice under the forms of law."[61] Robinson referred to the levying of taxes upon the people as "legalized robbery" and warned of the negative consequences of over-education.

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> But to levy taxes upon the people for such purposes is a species of legalized robbery and even the recipients come to know it. Their sense of injustice cannot fail to condemn it. It lowers their standard of morality and helps to debauch instead of purifying public opinion. It also breeds discontent on the part of those who are educated, or attempt to be educated, to something above that for which they are fitted.[62]

And, addressing the argument that the "system" is a benefit to the poor, Robinson quickly denounced the idea as false.

> The argument sometimes advanced that this system is a benefit to the poor is an utter fallacy. The children of the poor generally leave the schools with a common school education and go to work for themselves or their parents. Yet while the poor man's children are thus at work, his little home is taxed to give the children of others a collegiate education.[63]

Optimistic that his ideas would be accepted, Robinson affirmed his faith in the future.

> These views are so manifestly just, that I have no doubt they will ultimately prevail. Indeed there seems to have already been a cessation of efforts to establish high schools, academies and colleges and support them by taxation.[64]

IV. Martin B. Anderson

While Robinson was governor, a similar type of opposition to public higher education was developing in other spheres of state government. In 1877, the Regents of the University published its annual report and included in it the proceedings of the Regents Convocation of 1876. The Regents had been strongly in favor of some state support for secondary and higher education. However, one of the topics at the Convocation was the "voluntary principle" of school support. At the convocation, the president of the University of Rochester, Martin B. Anderson, read a paper entitled "Voluntaryism in Higher Education." In it he assailed the principle of state supported higher education on religious grounds. Anderson cited two postulates that he believed were gaining wide acceptance:

> One is that the common school, supported by taxation, is necessary to the well-being and permanence of the State. The other is that, tax payers having common rights, these schools should be administered as to do no injustice to the religious conviction of any citizen. The duty of the State to furnish an intellectual and moral education in the common schools is accepted on the grounds of self-preservation. As, by common consent, the giving of religious instruction stands outside of the functions of the State, it follows that this duty falls upon the parent, the church and the Sunday school, under the natural working of the voluntary principle.[65]

On the basis of these two postulates, Anderson ardently rejected the idea of state intervention in any kind of higher education:

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> Hence, professional education and high liberal training necessary for the professions, should not be undertaken by the State, because this education is for the benefit of but a very small and special class of the community, and can also be better provided for by the natural action of the law of supply and demand.[66]

Anderson further explains how the state does wrong by undertaking to teach in domains beyond its proper sphere of authority:

> The State — as an organization with powers limited mainly to the protection of life, property and personal liberty — may not undertake to teach what belongs to the domain of the conscience. In doing so, it transcends its legitimate sphere. High education cannot be adequately conducted without the discussion, in the way of acceptance or denial, of God, the soul, the objective sanctions of morality, and all the forces which lead a man to God. As this higher education, in order to be scientific and thorough, is conversant with the sphere of topics which involve religious and moral principles, it should be referred, like religious beliefs and modes of worship, to the action of the voluntary principle.[67]

Anderson held that the function or duty to provide higher education falls "upon individual and corporate benevolence, acting under the general laws of the state, which define the limits and powers of religious and benevolent organizations generally."[68]

In common with Governor Robinson, Anderson believed that his argument did not apply to the curriculum of the common schools:

> While I hold that the elements of knowledge, such as are taught in the common school, may be taught and learned without serious and scientific discussion of these points of controversy, this is not true of the subject matter of higher education.[69]

And in the following passage one is reminded of the principles of the earlier governor, Tilden.

> But we are told that our institutions of higher learning ought to be centralized. We answer: A country like ours, in which local self-government so predominates, never can, and never should, be brought under the control of a single type of culture. Our country's intellectual life ought not be shaped from any state or intellectual center. Such a state of things would inevitably destroy the freedom, the variety, the manifoldness, which is one of the best characteristics of American society as contrasted with that of France and England.[70]

Anderson concluded that any attempt to centralize or monopolize higher education would fail because:

> The rapid increase of people, and the new distribution of our population, which results from our constantly developing railroad system, forbid the possibility that a few centers of education, however largely endowed, shall satisfy the intellectual wants of the future. We believe that, in the future development of the wealth and intelligence of our country, the voluntary

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> system, which has been so satisfactory and successful in the maintenance of religion, will be abundantly able to meet all the demands of higher liberal and professional education.[71]

V. Charles E. Finch

Also in 1876, Charles Finch, editor of the Rochester *Democrat and Cronicle,* delivered a paper on "Education and the State" before the New York State Teacher's Association. The paper excited much interest and discussion. Finch laid down two propositions for public policy in education: (1) that the state has "no right to foster . . . scholarship," and (2) that the voluntary principle not only can, but will, take care of higher education.[72] Finch set down what amounted to basic Jeffersonian-Jacksonian political philosophy at that time:

> As the individual surrenders to the state the rights that he cannot retain consistently with its well being and the right of his neighbour, so the state assumes to do no more towards or for the individual than its autonomy prescribes. Hence it must neither oppress nor favour. It must be alike devoid of absolutism and of paternalism. It must observe the maxim "that government is best which governs the least", and it must also be essentially non paternal in its character. And yet, under any and every government, there is the constant temptation to the exercise of paternal prerogatives . . . Let the rule be observed that government will do nothing that the voluntary principle can do, and there would be little left for democracy to enjoin, or to vindicate.[73]

Finch contrasted the basic value difference between primary and secondary education in their relation with the state.

> Secondary education, valuable as it is for the individual, has a foundation entirely distinct from that of elementary education. The one is a personal benefit. The other is the national salvation. The one is democratic. The other is aristocratic. With all the devotion to their cause of the advocates of secondary education by the state, we never hear them propose to make it compulsory. They dare not. Seriously pushed it would foment civil war. And yet, why do they hesitate, if it is the duty of the state to educate classically and scientifically, as well as elementarily? With all their rhetoric, they detect the poverty of the thought it adorns.[74]

Finch, like Anderson and Bishop McQuaid, rejected the intermingling of theology in higher studies and believed that state involvement in such courses of study would undermine the separation of church and state.

> It occurs to me that there is another very potent objection to the high school. It cannot consist with absolute secularity of education. The American people insist upon the separation of church and state. They are in earnest about this. Not so much as the weight of a little finger must the church lay upon the state, not so much as a farthing must the church (at least directly) draw from the public revenues, not the most rudimentary lesson must it inculcate in the name of the state. This vital principle the two political parties now contending

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> for supremacy profess in their platforms. Nine-tenths of the religious organizations endorse it. No sectarianism in the schools has the assent of the undoubted majority of citizens. In the common school the principle can be maintained. The curriculum permits — nay, involves it. Here, America takes her stand against the division of the school moneys among the sects. In this, again, there is the sternest logic and truest patriotism. Ascend to the high school, and the vindication of this fundamental becomes impossible, for here there is a curriculum the moiety of which cannot be pursued without receiving the theological bias.[75]

The following year, 1877, Charles E. Finch became a Regent of the University of the State of New York.

VI. Edward Livingston Youmans

By 1878, after various opponents of public secondary and higher education had defended the principle of liberty and equality before the law, the struggle began to develop at the level of the individual colleges. Articles denouncing the establishment of new public colleges began to appear more often in newspapers and journals. One of those who undertook to confront a particular institution was Edward Livingston Youmans, editor of the influential *Popular Science Monthly* and a leading disciple of Herbert Spencer, and the City College of New York was his target.

In 1878 Youmans published an editorial in *Popular Science Monthly* in which he critically attacked the establishment of the municipally funded and tuition free City College. The article, entitled "How New York City Got a College," explained the injustice and political underhandedness that surrounded its foundation. Youmans remarked:

> What on earth New York wanted with a college, when there were two good ones already in town, not half full of students, might be a perplexing inquiry, did we not know that corporations, as well as individuals, often find themselves possessed of things which they didn't want and never intended to have.[76]

Youmans reminded his readers that the decision to establish the college was not necessarily the choice of the people. "The people did not say, 'Go to, let us have a college, cost what it will, and teach Columbia and the New York University how to manage a higher education of learning.' "[77]

Youmans felt strongly that if the issue had been brought before the people, as he thought it rightfully should, the result would have been different. He declared:

> Of course the repudiation of the original school, and of the ideas which led to its establishment, was not submitted to a popular vote, and it's equally certain that, if the projected change had been thus submitted it would have been overwhelmingly rejected.[78]

Furthermore, Youmans pointed out the inconsistency in the state's position on the principle of voluntaryism.

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> Having affirmed the voluntary principle in religion, and denied the right of the state to meddle in this most important concern — having affirmed that the individual is a better judge in this matter than the state can be — when it comes to education, we deny the voluntary principle, deny that individuals here know what is best for themselves, and that the state — that is, the politicians who happen at any time to be in office — is better than the people to be entrusted with the absolute control of the subject.[79]

By 1880 the governorship had changed hands and Lucius Robinson had stepped down. It is somewhat ironic that, after a decade of steadfast gubernatorial opposition to public secondary and higher education, Robinson's successor was the man after whom the first public state university of New York was named. Ezra Cornell was a good example of the older Whiggish sort of Republican. He acquired a fortune when his own telegraph ventures were bought out against his own will in return for Western Union stocks which subsequently skyrocketed in value. Cornell joined forces with Andrew White of the Literature (education) Committee of the Senate, and the persuasive duo succeeded in establishing Cornell University.[80] Unquestionably a supporter of public education, the newly elected Governor Cornell affirmed in his annual message of 1880 that he was a "positive advocate of progressive education." In his second annual message Cornell argued: "Public education is also a means of public economy, for as intelligence is the best antidote for vice and crime, the expenditures for education will lessen the demands for charity and correction."[81]

During Cornell's first year in office, E. L. Youmans reactivated his campaign against the establishment of the City College of New York. That year he published another editorial, this one entitled "Let Well Enough Alone," a title he likened to the posture of the new Board of Education president, Stephen C. Walker. Youmans accused Walker of inconsistency in his viewpoints, alleging that whereas Walker had formerly been opposed to the policy of taxation to sustain academies or higher education, "no sooner does he find [himself] in the official saddle than all doubt is dissipated, and he becomes an eager apologist of things as they are."[82] Youmans remarked:

> Having got two colleges, embracing every known subject of academic instruction, and grammar schools devoted to fifteen or twenty subjects which are neither essential nor elementary, and endowed beyond all dreams of private munificence by legislation which subsidizes for their support the property, real, personal, and mixed, of the whole commonwealth, for all of which he has never seen sufficient reason, Mr. Walker thinks he may now rest and be thankful. . . . A certain questionable policy being consummated beyond what its promoters could ever have dreamed, he thinks the rule should be now, "Let well enough alone."[83]

Youman's words in 1880 reveal a stronger emphasis and a less-controlled bitterness than his editorial of two years prior.

> The school system of New York has been revolutionized and perverted from its original purposes, and that not by popular initiation and approval, but by

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> maneuvering and indirection, by wire-pulling and huggermuggery. It has been prostituted to ends never contemplated by those who established it and have sustained it, and this has been done in express defiance of the known convictions and wishes of the people.[84]

Conclusion

As the 1880's began to unfold, new opponents appeared and old opponents reappeared. Robert Finch again denounced government involvement in secondary and higher education, this time before the Regents Convocation of 1883.[85] At the same convocation, A. C. Hill, Principal of Cook Academy, delivered a paper in which he challenged the state's right to promote secondary education.[86] In 1886, Governor David B. Hill failed to approve a bill appropriating $60,000 for the use of academies and high schools.[87] Also in the eighties, the American hierarchy of the Catholic Church, represented by Bishop McQuaid and others, continued their vigilant fight against the state's involvement in all levels of education.[88]

Opposition to public secondary education was not limited to the individuals noted in this essay. Although reasons may have differed, there is strong evidence that public secondary education in the nineteenth century commanded significant opposition from various sectors of the social structure. Recent revisionist historical studies have, for example, emphasized the opposition among the poor. Referring to two such studies, Walter Feinberg has written:

> the point has been made that, at least during the early years of public education, the poor themselves resisted the expansion of public education and did not, as suggested by many traditional historians welcome it as an unmitigated blessing. The revisionist points out that in a number of instances expansion was resisted and the resistance was overcome only by outmaneuvering the poor in the political arena and by softening the rhetoric making the inroads of school reform easier.[89]

Taking into consideration the opposition to public secondary schooling discussed in this paper, as well as that presented by the revisionists, one may well ask why the establishment of public secondary education was successful. An answer to this question is offered by Robert Church in his *Education in the United States*. Church describes two forces which contributed to the growth of public secondary education. In explaining the first of these he says:

> Much of this pressure appears to have come from anxious middle class people, fearful of their economic and social circumstances, seeking to use the high school as a badge of status which would partially substitute, they hoped, for a lack of firm social status that rested on wealth or inherited place in a stable social structure. The high school developed as a separate unit to facilitate its symbolic value as a badge of status.[90]

Church describes a second force integral to the development of public secondary education as follows:

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> Many members of the upper class fought for the existence of such institutions. Their purposes, however, seemed to have differed. The upper class most often saw, or thought they saw, the connection between the upper extension of a practical English education and economic growth. They also conceived of the high school as a means of recruiting talent from below for assistance in managing the burgeoning economic machine of mid-nineteenth century America. They also worried about social unity and apparently felt somewhat guilty about their patronage of such exclusive institutions as the Academies. The elites saw the public high school not as a help to the lower middle class, but, rather, as a means or restoring that sense of social harmony and community which their own economic and social endeavors had done so much to destory irreparably. The public high school, like the common school, would knit together the society by providing all children with a common educational experience and a common set of values. They rarely considered that the most alienated and impoverished classes could no more afford to attend the public high school than they could afford a boarding academy.[91]

Clearly, a considerable number of variables were at work both for and against the development of public secondary education.

As it turned out, in spite of its opponents and in spite of their commitment to individualism, public secondary and higher education did prevail by the end of the nineteenth century. Moreover, this commitment to individualism, which had played such an important part in the ideology of the oppositionists of the 1870's, soon began to permeate American pedagogical rhetoric as a convenient supplement to the rhetoric of democracy and idealism. Ironically, this rhetoric was in direct contrast to actual pedagogical practice, which was to mould the individual to society's conception of the good citizen, whether or not that pattern was relevant to the individual's experience or environment.

Historians of education in the United States have traditionally gravitated toward "consensus" as the model of the development of public secondary and higher education. Their histories represent the social system as a holistic enterprise with all belief structures and cultural elements ideally accommodating each other in a well-integrated form. They have tended largely to ignore the disharmonious elements, including that of opposition. By omitting consideration of such an important element, they have left their histories biased and incomplete by virtue of their narrowness.

A revised history, encompassing elements of opposition such as existed between 1870 and 1880, would be more functionally useful and more realistic and would view the social system as being comprised of social groups with belief structures and interests which inevitably bring them into conflict with groups having opposed interests. This perspective creates a new understanding of the institutional development of public secondary and higher education. If we realize the importance of dissension, conflict, and opposition as ingredients of institutional change, we may see contemporary opposition to state interference in education as an impetus for change in the educational structure.

Yet two of the most recent educational histories — *Education in the United*

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States by Robert Church, and *Schooling in Capitalist America* by Sammuel Bowles and Herbert Gintis — make no mention of the significant patterns of opposition to public secondary and higher education in New York between 1865 and 1890.[92] While Diane Ravitch, in her history of public education in New York State, entitled *The Great School Wars,* focuses on the battles between various factions over school organization, management, and curriculum, her treatment of opponents of public education *per se,* apart from Roman Catholics, lacks detail and makes no attempt to place this opposition in a wider ideological and political context.[93] My research indicates that the scope of support for state controlled and subsidized schooling varied according to the political party in command of the governor's office or the legislature. Furthermore, the period of the 1870's in New York State, a period of Democratic ascendency, was marked by an essentially *laissez faire,* minimalist government philosophy which expressed itself on the issue of education in efforts to reduce public expenditure for schooling and to keep the state out of the business of higher education entirely. It was a movement that espoused the belief that the voluntary system was adequate to the needs of society for schooling beyond the primary level.

NOTES

1. See Michael Katz, *Class Bureaucracy and Schools* (New York: Praeger, 1975); and Colin Greer, *The Great School Legend* (New York: Viking Press, 1972).
2. James C. Mohr, *The Radical Republicans and Reform in New York During Reconstruction* (Ithaca, N.Y.: Cornell University Press, 1973).
3. *Ibid.*
4. Laws of New York 1784, 7th sess., chap. 51.
5. Laws of New York 1784, chap. 82.
6. Laws of New York 1790, chap. 38; amended 1802, chap. 105.
7. Laws of New York 1813, chaps. 187, 199; 1814, chap. 23; 1819, chap. 222; 1824, chap. 313; 1827, chap. 228; 1829, chap. 325; 1830, chap. 184; 1831, chap. 281; and New York State Constitution of 1846, Article 9.
8. Session Acts 1838, chap. 237.
9. Constitution of 1846, Article 9.
10. See Samuel S. Randall, *The Common School System of the State of New York* (Troy, N.Y.: Johnson and Davis Press, 1851), p. 55.
11. New York State Assembly Journal 1866, p. 1339; New York State Senate Journal 1866, p. 1076.
12. Laws of New York 1854, chap. 97.
13. See Walter John Gifford, *Historical Development of the New York State High School System* (Albany, N.Y.: J. B. Lyons, 1922), p. 60.
14. *Ibid.*
15. See George Frederick Miller, *The Academy System of the State of New York* (1922; New York: Arno Press, 1969), p. 80.
16. Laws of New York 1853, chap. 433.
17. Laws of New York 1864, chap. 555.
18. Assembly Journal 1867, pp. 1872, 1434.
19. Randall, *The Common School System,* pp. 60–94.
20. Miller, *The Academy System,* pp. 42–43.
21. See the Debates and Proceedings of the Constitutional Convention of 1867.
22. Assembly Journal 1869, p. 1983.
23. Frank C. Abbott, *Government Policy and Higher Education* (Ithaca, N.Y.: Cornell University Press, 1958), p. 57.

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24. See *ibid.*, pp. 57–78.
25. See Edwin Platt Tanner, "Postwar Problems and Political Reformers," in Alexander C. Flick, ed., *History of the State of New York* (New York: Columbia University Press, 1935), p. 149.
26. See De Alva Stanwood Alexander, *A Political History of the State of New York* (New York: Holt and Co., 1909).
27. See Leo Hershkowitz, *Tweed's New York* (Garden City, N.Y.: Anchor Press, 1977). While on the Committee of Charitable and Religious Societies in 1869, Tweed introduced a bill to have the city pay a portion of the annual expenses for parochial schools. By 1870 dozens of parochial schools, mainly Catholic, applied for and received funds. Although the funding ended in 1871, this was the first time parochial schools had received state aid. Tweed also received permission, after bringing forward the necessary legislation, to erect Hunter College, a normal school, in New York City.
28. Assembly Documents 1870, no. 1, pp. 11, 12.
29. Assembly Documents 1871, no. 1, pp. 8, 9, 10.
30. Assembly Documents 1872, no. 1, p. 7.
31. See Abbott, *Governmental Policy and Higher Education*, pp. 57–58.
32. Report of the Superintendent of Public Instruction, 1870.
33. *Ibid.*
34. Proceedings of the University Convocation 1872, pp. 115–18.
35. Report of the Superintendent of Public Instruction, 1873.
36. Miller, *The Academy System*, p. 46.
37. Tanner, "Postwar Problems and Political Reformers," p. 160.
38. Assembly Documents 1873, no. 1, p. 7.
39. Assembly Documents 1974, no. 1, pp. 5, 6.
40. "The fact that no continuance of the 1872 appropriation was made that year contrasts itself with the fact that $300,000 was embezzled from the state treasury while corruption was at its height in both state and city government" (Gifford, *Historical Development*, p. 119).
41. Assembly Documents 1874, no. 1, pp. 5, 6.
42. From a speech delivered by Samuel J. Tilden to the Democratic State Convention held in Rochester, October 4, 1871.
43. Quoted in John Bigelow, *The Life of Samuel J. Tilden*, 2 vols. (New York: Harper & Bros., 1895).
44. *Ibid.*
45. *Ibid.*
46. Assembly Documents 1875, no. 1.
47. Benjamin B. Buckman, *Samuel Tilden Unmasked!* (1876).
48. *Ibid.*
49. Laws of New York 1875, chap. 353. See also Senate Journal 1875, pp. 117, 127, 131, 132, 707, 737; and Assembly Journal 1875, pp. 248, 648, 1040, 1226, 1332.
50. This act was passed originally in 1871. It was put through by the Committee on Charitable and Religious Societies headed by Tweed.
51. Related appropriations were: $40,000 from the Literature and U.S. Deposit Funds for the payment of teachers' salaries and $3,000 from the Literature Fund for the purchase of books. See *School Bulletin* 1875, vol. 2.
52. *School Bulletin* 1875, vol. 3.
53. Alexander, *A Political History*, p. 379.
54. Senate Documents 1877, no. 2, pp. 19–20.
55. *Ibid.*
56. Assembly Documents 1870, no. 1. "An Appeal on Behalf of Academies" was delivered by a Committee of the University Convocation of the State of New York. This appeared in the *Regents Report* of 1870.
57. Senate Documents 1878, no. 2, pp. 20–21; and 1879, pp. 15, 16.
58. *Ibid.*
59. *Ibid.*
60. *Ibid.*
61. *Ibid.*
62. *Ibid.*

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63. *Ibid.*
64. *Ibid.*
65. Martin B. Anderson, "Voluntaryism in Education," delivered at the Regents Convocation of 1876; appeared in the *Regents Report*, 1877, pp. 627–37.
66. *Ibid.*
67. *Ibid.*
68. *Ibid.*
69. *Ibid.*
70. *Ibid.*
71. *Ibid.*
72. Charles E. Finch, "Education and the State," *School Bulletin* 1876, vol. 3, pp. 66–68.
73. *Ibid.*
74. *Ibid.*
75. *Ibid.*
76. Edward Livingston Youmans, "How New York Got a College," *Popular Science Monthly* 13 (May 1878): 106–108.
77. *Ibid.*
78. *Ibid.*
79. *Ibid.*
80. See Mohr, *The Radical Republicans*, pp. 155–75.
81. Assembly Documents 1881, no. 1, Message of Governor Ezra Cornell.
82. Edward Livingston Youmans, "Let Well Enough Alone," *Popular Science Monthly* 16 (March 1880): 695–97.
83. *Ibid.*
84. *Ibid.*
85. *Regents Report*, 1884.
86. A. C. Hill, "Academies and Secondary Schools," in *ibid.*
87. Assembly Documents 1886, no. 1, Message of Governor David B. Hill.
88. *Ibid.*
89. Walter Feinberg, "Revisionist Scholarship and the Problem of Historical Context," *Teachers College Record*, vol. 78, no. 3, pp. 311–12. Feinberg's comments are in reference to the work, previously cited, of Katz (*Class Bureaucracy and Schools*), and Greer (*The Great School Legend*). See also William Bullough, *Cities and Schools in the Gilded Age* (New York: Kennikut Press, 1974).
90. Robert Church, *Education in the United States* (New York: Free Press, 1976), pp. 182–83.
91. *Ibid.*, p. 185.
92. *Ibid.*; and Sammuel Bowles and Herbert Gintis, *Schooling in Capitalist America* (New York: Basic Books, 1976).
93. Diane Ravitch, *The Great School Wars* (New York: Basic Books, 1974).

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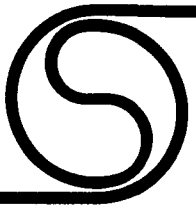

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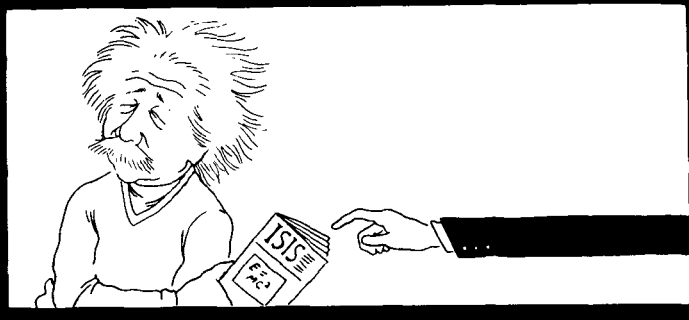

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